TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 417.

ANDREW L. ROBINSON AND JULIA R. SLOAN, APPELLANTS,

vs.

THOMAS M. ELLIOTT, ASSIGNEE OF J. T. COOLIDGE, A BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED MAY 14TH, 1874.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and held at the United States court-rooms, in the city of Evansville, in said district, before the honorable James C. Hopkins, judge of the district court of the United States for the western district of Wisconsin, designated by the honorable Thomas Drummond, judge of the 7th judicial circuit of the United States to aid the judge of the district court of the United States for the district of Indiana in holding the district or circuit court of the United States for said district of Indiana.

Be it remembered that heretofore, to wit, on the fifteenth day of December, A. D. one thousand eight hundred and seventy-three, there was filed in the office of the clerk of said circuit court (at Evansville) a bill in chancery, in the words and figures following, to wit:

To the judges of the circuit court of the United States for the district of Indiana. In chancery.

2 Andrew L. Robinson and Julia R. Sloan, citizens of the State of Indiana, bring this their bill against Thomas M. Elliott, assignee in bankruptcy of John T. Coolidge, surviving partner of the late firm of J. T. & S. A. Coolidge.

And thereupon your orator and oratress, humbly complaining, sheweth unto your honors that for ten years previous to the bringing of this bill the said John T. Coolidge and his brother, Seth A. Coolidge, constituted a partnership by the name, style, and firm of J. T. & S. A. Coolidge, and during all that time were engaged in the retail dry-goods business in the city of Evansville, in said State; that the said firm, desiring to borrow money of the First National Bank of said city, applied to your orator, Andrew L. Robinson, to become their accommodation endorser; and that from the year 1865 until the death of the said Seth A. Coolidge, as hereinafter stated, he did endorse or become accommodation surety upon the commercial paper of said firm, upon which they

3 obtained loans of money from that time, at different times, as their convenience required; that on the 7th day of July, 1871, he was their accommodation surety to the said bank for the sum of $7,600.00; that your oratress, Julia R. Sloan, during the said ten years loaned to the said firm divers sums of money, for which she took their notes bearing interest; the said loans in all amounted to the sum of $3,100.00; that on the said 7th day of July the said firm was indebted to your oratress on account of said loans in the sum of $3,174.00, for which they gave her their note of that date, payable four months after date.

Your orator and oratress further sheweth unto your honors that all of said sums of money so borrowed by the said firm of the said bank, and also that borrowed of your oratress, Mrs. Sloan, was put into the business of the said firm and became a part of their capital stock; that on the 7th day of July, 1871, the said firm still being in business, and being indebted as above described, your orator proposed that the said firm should give a mortgage upon their stock of goods then in their

4 store, No. 69 Main street, in said city, as well to indemnify your orator as their accommodation surety as also to secure to your oratress the payment of the said debt of $3,174.00; that, in accordance with said request, the said firm on that day made and executed to your orator and oratress their mortgage of that date, a copy of which is filed herewith as a part of this bill, marked Exhibit No. 1; that the said

mortgage was duly acknowledged and then recorded in the recorder's office of Vanderburgh County, in said State, on the 11th day of the same month, in the record of mortgages, in book T, pages 529 to 531; the stock of goods so mortgaged was of the value of $18,000.00; and that, according to the terms and conditions of the mortgage, the said firm retained possession of the same for the purpose of selling them off and paying the said debts; that the said firm sold a part of said mortgaged goods, and with the proceeds, at different times, paid a portion of said accommodation paper, and also the interest and a small part of the principal of the debt due to your oratress; and also, from time to time, they purchased new goods to keep up their stock.

5 Your orator and oratress further sheweth unto your honors that, on the 7th day of August, 1873, said Seth A. Coolidge departed this life intestate, leaving the said John T. Coolidge in possession of the store and business, who at once proceeded to make out a complete inventory and appraisement of the stock then on hand; and that on the 15th day of September, 1873, as such surviving partner, he filed said inventory and appraisement in the office of the clerk of the Vanderburgh circuit court; that the goods remaining on hand, with the furniture and fixtures, at the time of the death of said partner, were of the value of $14,935.34, and that the debts due to the said firm amounted to the further sum of $2,645.79, making in all the sum of $17,581.13; that, of the goods remaining on hand as aforesaid, there were goods of the value of $11,234.80, which were in said store, and which composed a portion of said stock of goods on the said 7th day of July, 1871, and that the residue of said stock, $3,700.54, were goods which had been purchased and added to said stock after the execution of the said mortgage.

6 Your orator and oratress further sheweth unto your honors that the said firm, after the execution of the said mortgage and previous to the decease of the said partner, paid the interest and the sum of $2,500 of the principal to the bank upon the said accommodation paper, and they also paid to your oratress, Mrs. Sloan, the interest upon her debt, and also $82.30 of the principal; that, on the 16th day of September last, your orator, Robinson, was liable to the said bank on said accommodation paper for the sum of $5,100, the same being renewals of the notes described in the said mortgage, $2,500.00 of which was, at that time, some weeks past due, and $2,600.00 to become due on or before the 27th day of the then next October. And the said firm still being indebted to your oratress in the sum of $3,091.70, upon the note held by her as aforesaid, your orator and oratress, on the said 16th day of September, in order to secure themselves against loss on account of said indebtedness, and in accordance with the terms and conditions of the said mortgage and by virtue of the same, demanded pos-

7 session of the goods, furniture, and fixtures, which were still in the same store, on Main street, and the said John T. Coolidge delivered them up; and that as mortgagees they took possession of the same, which possession they have ever since held, and which they continue to hold; that, on the next day after taking possession as aforesaid, to wit, on the 17th of that month, they advertized a part of said goods for sale at public auction, to wit, ten thousand dollars' worth, according to the terms of the said mortgage; that said sale was to have begun on the 28th day of said month at the same store, on Main street, in said city; that the object of making said sale was to procure funds to pay the said bank the said sum of $5,100 and accruing interest thereon, and also to pay to your oratress the amount of her said debt;

that, on the evening of the 27th day of that month, an injunction was issued by the judge of the United States court for the district of Indiana, upon the application of Messrs. Mackey, Nisbet & Co., creditors of the said firm, enjoining and inhibiting said sale; wherefore the same was not made.

8 Your orator and oratress further sheweth unto your honors that your orator has not paid the said indebtedness to the said bank, but the same is due, and he has been sued upon the same in the present November term of the Vanderburgh circuit court, together with the surviving partner and the administrator of the deceased partner; that, on the 27th day of September last, a petition in bankruptcy was filed in the United States district court for said district by the said Mackey, Nisbet & Co. against the said surviving partner, John T. Coolidge, and that, in pursuance to the prayer of said petition, the said firm and the said surviving partner were adjudged bankrupt on the 4th day of October last; and that, on the 12th day of November last, the said respondent, Thomas M. Elliott, was duly appointed assignee in bankruptcy of said surviving partner, and on the 14th day of the same month he was duly qualified, and entered upon the duties of his said trust; and that, on the 15th day of the same month, the effects and assets of the said firm were duly assigned to the respondent by the register in bankruptcy; that, afterwards, on the 20th day of said

9 November, the respondent demanded of your orator and oratress the possession of the said store, goods, furniture, and fixtures, which they refused to deliver to him, upon the ground that they held and were holding the same as mortgagees for the uses and purposes contemplated and set forth in the said mortgage.

That this demand for said goods, excepting only said fixtures which were delivered to your orators, was made by the respondent upon a claim and pretense that the said goods were a part of the assets of the said firm, and that the said mortgage was a fraud upon the other creditors of the said firm.

Your orator and oratress distinctly deny said charge of fraud, and they distinctly affirm that all the parties to the said mortgage, the said partners in giving said mortgage, and the surviving partner in delivering possession of said store and goods under the same as above set forth, and the said mortgagees in receiving said mortgage and in taking possession of the said property, acted in the utmost good faith, and without the intention of defrauding any one, either those persons who

10 at the date of the said mortgage might be the creditors of the said firm, or those who afterwards might become such creditors.

Your orator and oratress further shew unto your honors that all the debts which were owing by the said firm at the date of the said mortgage (except those described in that instrument) have been paid, except the sum of $3,500.00 due to Alfred Coolidge, the father of the said partners, the same being $1,000 loaned by the father to his sons in June, 1856, and evidenced by a promissory note due one day after date, and $2,500 loaned to them on the 28th day of February, 1871, for which they gave their note, due three months after date, the interest of which has been paid yearly at the rate of seven per cent. per annum; and that the whole amount of the indebtedness of the said firm at the present time is $17,395.92, as appears by the schedule of the said surviving partner, filed by him under oath as required by law; and that the assets of the said firm, as appears by the schedule filed by the said surviving

11 partner in bankruptcy, exceed the indebtedness of the firm in sum of $195.21. Your orator and oratress not having adequate

relief in a court of law, therefore pray that an account may be taken by and under the decree and direction of this honorable court of what is due to the said First National Bank for principal and interest on said accommodation paper, and also of what is due of principal and interest on the debt due to your oratress, and that the said mortgage may be decreed to be a lien upon the said goods for the payment of such sums as may so be found due, and that so many of said goods as may be necessary to pay said indebtedness and the cost of keeping the said goods since the 10th day of September last, and also the costs of the sale, may be decreed by this court to be sold in such manner as will best conduce to the interests of all the persons who may be interested therein, and that the proceeds may be applied to the payment of the costs of this suit, to
the costs of said sale, and to the costs of keeping said goods, and
12 also to the payment of the said indebtedness, and that the overplus of said goods may be delivered to the said respondent; and that your orator and oratress may have such further and other relief in the premises as the nature of their case shall require and to your honors shall seem meet,

May it please your honors to grant unto your orator and oratress the most gracious writ of subpœna of the United States of America, to be directed to the said Thomas M. Elliott, thereby commanding him at a certain day, therein to be named, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to perform and abide such order and decree therein as to your honors shall seem meet; and your orator and oratress shall ever pray.

A. L. ROBINSON,
JULIA R. SLOAN,
Complainants.

UNITED STATES OF AMERICA,
District of Indiana, ss:

13 Andrew L. Robinson, on his oath, says and declares that the matters and things stated in the foregoing bill as true are true so far as the same are stated of his own knowledge; and that those matters and things therein stated on his information and belief as true, are true as he verily believes.

A. L. ROBINSON.

Subscribed and sworn to before me this Dec. 15th, A. D. 1873.
J. D. HOWLAND, *Cl'rk.*

EXHIBIT No. 1.

This indenture made this 7th day of July, 1871, between John T. Coolidge and Seth A. Coolidge, partners, trading and doing business in the city of Evansville, State of Indiana, under the firm-name of J. T. & S. A. Coolidge, parties of the first part, and Andrew L. Robinson and Julia R. Sloan, of the city and State aforesaid, witnesseth:

That whereas the said Andrew L. Robinson is liable as ac-
14 commodation joint maker upon the following-described notes, held by the First National Bank of Evansville, made by said J. T. & S. A. Coolidge, payable at said bank, as follows: One dated May 6, 1871, at 3 months, for $1,000; one dated May 12, 1871, for $1,000; one dated May 31, 1871, for $1,100, payable at 3 months and 90 days respectively; one dated June 6, 1871, for $1,000; one dated June 10, 1871, for $1,500; one dated July 3, 1871, for $500, and one dated April

22d, 1871, for $1,500; all payable at three months respectively; and whereas it is contemplated that in order to take up said several notes, or some of them, it may become necessary to renew the same or discount other notes to enable the said mortgagors to take up said notes or raise money therefor; and whereas said J. T. and S. A. Coolidge are indebted to said Julia R. Sloan, in the sum of $3,174, which is evidenced by their note of this date, to her payable four months after date, with seven per cent. interest; and whereas it is contemplated that if it is not convenient to pay the same, that it may be renewed from time to
15 time as the parties may agree: Now, therefore, said parties of the first part, in consideration of the premises, and to secure, indemnify, and keep the said Andrew L. Robinson harmless against all losses, damages, costs, and expenses which he may incur by reason of his having executed the said notes as surety to said parties of the first part, and on account of his hereafter signing, making, accepting, drawing, or endorsing any notes, bills, drafts, or other evidences of indebtedness in renewal of said notes, or to raise money to take up the same or any renewal thereof, and in order to secure the payment of said note to said Julia R. Sloan, have granted, bargained, and sold, and do hereby grant, bargain, sell, and convey, unto the said parties of the second part, all the goods, wares, and merchandize, furniture and fixtures now in the store of the parties of the first part on Main street, Evansville, aforesaid; and it is hereby expressly agreed that until default shall be made in the payment of some one of said notes, or some paper in renewal thereof, the parties of the first part may remain in
16 possession of said goods, wares, and merchandize, and may sell the same as heretofore, and supply their places with other goods, and the goods substituted by purchase for those sold shall, upon being put into said store or any other store in said city where the same may be put for sale by said parties of the first part, be subjected to the lien of this mortgage.

And it is hereby expressly agreed that upon the failure of the said parties of the first part to pay any one of said notes upon which said Robinson is liable, or any paper given in renewal thereof, or any note or other paper given to raise money to take up any one of said notes, or any one given in renewal thereof, at maturity, thereupon said Robinson shall have the right without let or hindrance to enter into said store of the parties of the first part and take possession of a sufficient amount of goods to satisfy, pay, and discharge all the paper upon which he shall then be liable as surety for said parties of the first part, and shall
17 have full power and authority, upon ten days' public notice, to sell at public auction such amounts of said goods as shall be necessary to pay said paper on which he shall be so liable as the same shall mature.

It is hereby expressly stipulated that said Robinson shall have full power to seize and sell goods for the payment of notes which shall be due and remain unpaid in the first instance, without being required to take up the notes and then look to his principals for indemnity, and to seize and hold goods to secure the payment of all paper on which he may be liable upon failure to pay any one note.

And, in like manner, in case parties of the first part shall fail to pay said note to said Julia R. Sloan, or any renewal thereof, then she may seize a sufficient amount to satisfy said note, and of any goods on hands on which this mortgage operates, and proceed after ten days' notice to sell the same at auction for the satisfaction of said note and all interest and expenses of sale.

18 In testimony whereof the parties of the first part have hereunto set their hands and seals the date above written.

JOHN T. COOLIDGE. [SEAL.]
SETH A. COOLIDGE. [SEAL.]

STATE OF INDIANA,
Vanderburgh County, ss:

Before me, the undersigned, a notary public in and for said county, on this 10th day of July, 1871, the above-named John T. Coolidge and Seth A. Coolidge acknowledged the execution of the foregoing instrument in writing.

Given under my hand and notarial seal the date aforesaid.

JNO. E. IGLEHEART. [SEAL.]

[Rev. stamps, $11.00.]

On the back of said mortgage are the following endorsements:

"Received for record this 11th day of July, 1871, at 11 o'clock a. m., and recorded in record-book T, page 529 to 531.

C. TORNHEMELT, *R. V. C.*

19 Whereupon there issued out of the office of the clerk of said court a subpœna in chancery in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Indiana:

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are commanded to summon Thomas M. Elliott, assignee in bankruptcy of John T. Coolidge, surviving partner of J. T. & S. A. Coolidge, bankrupts, citizen of and resident in the State of Indiana, if he be found in your district, to be and appear in the circuit court of the United States for the district of Indiana, aforesaid, at Evansville, on the first Monday in February next, to answer a certain bill in chancery filed and exhibited in said court against him by Andrew L. Robinson and Julia R. Sloan, citizens of and resident in the State of Indiana.

Hereof he is not to fail, under the penalty of the law thence en-
20 suing. And have you then and there this writ:

Witness the honorable Nathan Clifford, Chief Justice of the United States, this 15th day of December, A. D. 1873, and in the 98th year of the Independence of the United States of America.

Attest:

J. D. HOWLAND, *Clerk.*

MEMORANDUM.—The said defendant is required to enter his appearance in this suit in the clerk's office of said court on or before the first Monday of February, 1874, otherwise the said bill may be taken pro confesso.

J. W. HOWLAND, *Clerk.*

Which subpœna in chancery was afterwards returned by the marshal of said district with the following endorsement thereon:

"Came to hand Dec. 15th, 1873.

I have served this writ on Thomas M. Elliott, assignee, &c., by reading and delivering to him a true copy, Dec. 16th, 1873.

BEN. SPOONER, *U. S. Marshal,*
21 By SAMUEL DAY, *Deputy.*

1 service, 2.00; 1 copy, 1.00; ret. 10—$3.10.

And be it further remembered that afterwards, to wit, on Tuesday, the third day of February, A. D. 1874, the same being the second day of the regular February term, 1874, of said circuit court, the following further proceedings in said cause were had and held:

ANDREW L. ROBINSON, JULIA R. SLOAN,
v.
THOMAS M. ELLIOTT, ASSIGNEE IN BANKRUPTCY, &c. } No. 95. Chancery.

Come now Messrs. Shackelford, Palmer & Richardson, and Azro Dyer, esq., of counsel for the respondent, and file his demurrer to the complainants' bill herein, in the words and figures following:

To the judges of the circuit court of the United States for the district of Indiana. In chancery.

22 ANDREW L. ROBINSON ET ALS.
v.
THOMAS M. ELLIOTT, ASSIGNEE IN BANKRUPTCY of John T. Coolidge, surviving partner of the late firm of J. T. & S. A. Coolidge.

The demurrer of Thomas M. Elliott, assignee, &c., defendant, to the bill of complaint of Andrew L. Robinson and Julia R. Sloan.

Said defendant, by protestation, and not confessing any of the matters in and by said bill complained of to be true in manner and form as therein set forth, says, that he is advised that there is no matter or thing in said bill good and sufficient in law to call this defendant in this honorable court for the same, but that there is good and sufficient cause of demurrer thereto, and does demur accordingly; for cause of demurrer says that said bill, in case the same were true, contains no matter of equity wherein the court can ground any decree or give complain-
23 ants any relief as against the defendant.

Wherefore, and for divers other reasons and errors in said bill contained and appearing on the face thereof, this defendant does demur thereto, and humbly craves the judgment of this honorable court whether he is compellable or ought to make any answer thereto otherwise than aforesaid. And defendant humbly prays to be hence dismissed with his costs and charges, in this behalf most wrongfully sustained.

AZRO DYER & SHACKELFORD,
PALMER & RICHARDSON,
For THO'S M. ELLIOTT.

And afterwards, to wit, on Tuesday, the 10th day of February, A. D. 1874, the same being the eighth day of the regular February term, 1874, of said court, the following further proceedings in said cause were had and held:

ANDREW L. ROBINSON AND JULIA R. SLOAN,
vs.
THOMAS M. ELLIOTT, ASSIGNEE OF JOHN T. Coolidge, surviving partner of J. T. and S. A. Coolidge. } Chancery.
24

And now here come the complainants by counsel, and the defendants also come in like manner, and the demurrer heretofore filed to the bill of complaint herein is submitted to the court upon argument; and the court being sufficiently advised, it is adjudged by the court that said

bill of complaint contains no matter of equity wherein the court can grant any decree.

It is therefore considered that said demurrer be, and the same is hereby, sustained, and said bill of complaint be dismissed.

It is further adjudged that the complainants pay the costs. And thereupon the complainants pray an appeal to the Supreme Court, which is granted. And the complainants now file their bond in the penal sum of one thousand dollars, with Asa Igleheart as surety, which bond is now here approved.

25 *Copy of bond on appeal.*

In the circuit court of the United States for the district of Indiana.

ANDREW L. ROBINSON AND JULIA R. SLOAN
vs.
THOMAS M. ELLIOTT, ASSIGNEE OF J. T. Coolidge.

We, Andrew L. Robinson and Asa Igleheart, are held and bound unto Thomas M. Elliott, assignee of John T. Coolidge, surviving partner of J. T. & S. A. Coolidge, in the penal sum of one thousand dollars, the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed and dated February 12th, 1874.

The condition of the foregoing obligation is such, that whereas said complainants in the above-entitled cause have taken an appeal to the Supreme Court from a decree rendered against them and in favor of said defendant by said court in said cause:

26 Now, if said complainants shall duly prosecute said appeal with effect, and abide by, keep, and perform such decrees as shall be rendered or affirmed against them in the Supreme Court, and shall pay and satisfy all costs and damages which shall be awarded against them, then this obligation shall be void; else in force.

(Signed) A. L. ROBINSON.
ASA IGLEHEART.

27 DISTRICT OF INDIANA:

I, John D. Howland, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings had in the within-entitled cause as fully as the same appears of record now on file in my office at Evansville.

Witness my hand and the seal of said court this twenty-fourth day of April, A. D. 1874.

J. D. HOWLAND, *Clerk.*

DISTRICT OF INDIANA:

I, Walter Q. Gresham, judge of the district court of the United States for said district, do certify that, at the date of the foregoing certificate, John D. Howland was, and now is, the clerk of the circuit court of the United States for said district, and that his attestation aforesaid is in due form of law.

Witness my hand this 24th day of April, 1874.

W. Q. GRESHAM.

(Indorsement on cover:) No. 417. Andrew L. Robinson & Julia R. Sloan, appellant, vs. Thomas M. Elliott, assignee of J. T. Coolidge, a bankrupt. Indiana C. C. U. S. Filed 14th May, 1874.

In the Supreme Court of the United States.

ANDREW L. ROBINSON, et. al.,

VS.

THOMAS M. ELLIOTT, Assignee.

ABSTRACT, ASSIGNMENT OF ERRORS AND ARGUMENT

ASA IGLEHART,
A. L. ROBINSON,
Counsel for Appellants.

EVANSVILLE, INDIANA.
Journal Co., Printers, Stationers and Binders.
1874.

In the Supreme Court of the United States.

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VS.

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In the Supreme Court of the United States.

Andrew L. Robinson and Julia R. Sloan vs. Thomas M. Elliott, Assignee in Bankruptcy of John T. Coolidge, surviving partner of the late firm of J. T. & S. A. Coolidge.	CHANCERY.

ABSTRACT.

This is an appeal from the Circuit Court for the District of Indiana, from a decree dismissing a bill in chancery against the appellee as filed by the appellants.

The allegations in the complaint are in substance as follows: John T. and Seth A. Coolidge, brothers, were partners in the retail dry goods trade in the city of Evansville, Indiana, having been in business there since the year 1863. On the 7th day of July, 1871, they were indebted to appellant, Mrs. Sloan, in the sum of $3,174.00 for money previouily borrowed of her to aid them in their business.

At the same time they were also indebted to the First National Bank of that city in the sum of $7,600, evidenced by divers promissory notes of the said firm, on which Robinson was then accommodation surety; and to secure to Mrs. Sloan the payment of that loan, and indemnify the said Robinson as such surety, they made and executed to the complainants a chattel mortgage upon their stock of goods then in their rented store, including also the furniture and fixtures connected with the same. That mortgage was duly acknowledged, and recorded on the 11th day of July,

1871. By the terms of the mortgage the said partners were left in possession of the property with permission to buy and sell and trade and pay off the said debts. That they continued in possession, sold a part of the mortgaged goods and with the proceeds bought other goods to replenish the stock. They paid the interest on the debt of Mrs. Sloan and a small part of the principal. They also paid the interest on the bank debt and $2,500 of the principal. On the 7th day of August, 1873, the said Seth A. Coolidge departed this life. His brother John proceeded immediately to make out an inventory and appraisement of the goods and property of the firm as required by the law of Indiana, which was filed in the County Clerk's office on the 15th day of Sept. 1873, duly verified by the oath of the surviving partner. That the assets of the firm at the time of the decease of the said Seth A. Coolidge, of goods on hand and debts due to the firm, amounted to $17,581.13, and the debts and liabilities of the firm at the same time were $17,395.72.

That of the goods remaining on hand in the said store at the time of said appraisement, Sept. 15th, 1873, there were goods of the value of $11,234.80 which were in the store on the 7th day of July, 1871, at the time the mortgage was executed, and that the residue of the stock, $3,-700.54, was of goods which had been purchased and placed in the store after the said mortgage was made. The mortgage provides for a lien upon goods which may be bought and placed in the store in lieu of those sold.

That on the 16th day of September, 1873, to secure themselves against loss on account of said indebtedness, the mortgagees demanded and took possession of the said goods and property under and by virtue of the terms of the said mortgage, and advertised $10,000 worth of the same for sale at auction on the 28th day of the same month. Proceedings in bankruptcy against John T. Coolidge having been commenced by one of the creditors of the said firm, and an injunction having been issued to prohibit the sale, it was not held.

On the 4th day of October, 1873, he was adjudged a bankrupt, and on the 12th day of November last the said respondent, Elliott, was appointed assignee, and was duly qualified two days afterwards, and an assignment of the bankrupt's effects was made to Elliott in due form of law. On the 20th day of the same month the said Elliott as such assignee demanded of the appellants the possession of the said goods and property which, they refused to deliver on the ground that they held the same in good faith as mortgagees to secure themselves as provided in the said mortgage. That they are still in possession of the said property, holding the same under that instrument. That the debts which were owing by the said firm at the time of executing said mortgage, have all been paid except the sum of $3,500 due to Alfred Coolidge, the father of the partners—$1,000 of which was borrowed in the year 1856, and $2,500 on the 28th day of Feb. 1871, and evidenced by two notes due three months after date respectively. The interest on this debt has been paid yearly at the rate of seven per cent. per annum.

The debt on which proceedings in bankruptcy were begun was contracted by the said firm long after the making and recording of the said mortgage. That the complainants, mortgagees, are still in possession of the said mortgaged property.

The bill further alleges that the complainants have in all things acted in good faith, and deny all fraud and all intent to defraud either the creditors of the said firm at the time of the date of their mortgage, or those who might afterwards become such.

The bill prays that an account may be taken of the debts due the said bank, and of the money due to the complainant Mrs. Sloan, and that the said mortgage may be deemed to be a lien on the said goods and property, and that so many of said goods as may be necessary for that purpose may be sold to pay said debts and the cost and expense of keeping

the same since the said 16th day of September and also the costs of the sale, and for all other proper relief.

The mortgage is filed with the bill as an exhibit, and reads as follows:

Exhibit No. 1. This indenture, made this 7th day of July, 1871, between John T. Coolidge and Seth A. Coolidge, partners, trading and doing business in the city of Evansville, State of Indiana, under the firm name of J. T. & S. A. Coolidge, parties of the first part, and Andrew L. Robinson and Julia R. Sloan of the city and State aforesaid, witnesseth:

That whereas the said Andrew L. Robinson is liable as accommodation joint maker upon the following described notes, held by the First National Bank of Evansville, made by said J. T. & S. A. Coolidge, payable at said bank, as follows: One dated May 6th, 1871, at three months, for $1,000; one dated May 12, 1871, for $1,000; one dated May 31, 1871, for $1,100, payable at three months and ninety days respectively: one dated June 6, 1871 for $1,000; one dated June 10, 1871, for $1,500; one dated July 3, 1871, for $500, and one dated April 22d, 1871, for $1,500; all payable at three months respectively; and whereas it is contemplated that in order to take up said several notes, or some of them, it may become necessary to renew the same or discount other notes to enable the said mortgagors to take up said notes or raise money therefor; and whereas said J. T. & S. A. Coolidge are indebted to said Julia R. Sloan in the sum of $3,174, which is evidenced by their note of this date, to her payable four months after date, with seven per cent. interest; and whereas it is contemplated that if it is not convenient to pay the same, that it may be renewed from time to time as the parties may agree; Now, therefore, said parties of the first part, in consideration of the premises, and to secure, indemnify and keep the said Andrew L. Robinson harmless against all losses, damages, costs and expenses which he may incur by reason of his having executed the said notes

as surety to said parties of the first part, and on account of his hereafter signing, making, accepting, drawing or endorsing any notes, bills, drafts or other evidences of indebtedness in renewal of said notes, or to raise money to take up the same or any renewal thereof, and in order to secure the payment of said note to said Julia R. Sloan, have granted, bargained and sold, and do hereby grant, bargain, sell and convey unto the said parties of the second part, all the goods, wares and merchandise, furniture and fixtures now in the store of the parties of the first part on Main Street, Evansville, aforesaid; and it is hereby expressly agreed that until default shall be made in the payment of some one of said notes, or some paper in renewal thereof, the parties of the first part may remain in possession of said goods, wares and merchandise, and may sell the same as heretofore and supply their places with other goods, and the goods substituted by purchase for those sold shall, upon being put into said store or any other store in said city where the same may be put for sale by said parties of the first part, be subjected to the lien of this mortgage.

And it is hereby expressly agreed that upon the failure of the said parties of the first to pay any one of said notes upon which said Robinson is liable, or any paper given in renewal thereof, or any note or other paper given to raise money to take up any one of said notes, or any one given in renewal thereof, at maturity, thereupon said Robinson shall have the right without let or hinderance to enter into said store of the parties of the first part and take possession of sufficient amount of goods to satisfy, pay and discharge all the paper upon which he shall then be liable as surety for said parties of the first part, and shall have full power and authority, upon ten days' public notice, to sell at public auction such amounts of said goods as shall be necessary to pay said paper on which he shall be so liable as the same shall mature.

It is hereby expressly stipulated that said Robinson shall have full power to seize and sell goods for the payment

of notes which shall be due and unpaid in the first instance without being required to take up the notes and then look to his principals for indemnity and to seize and hold goods to secure the payment of all paper on which he may be liable upon failure to pay any one note.

And, in like manner, in case parties of the first part shall fail to pay said note to said Julia R. Sloan, or any renewal thereof, then she may seize sufficient amount to satisfy said note and of any goods on hands on which this morsgage operates and proceed after ten days' notice to sell the same at auction for the satisfaction of said note and all interest and expenses of sale.

In testimony whereof, the parties of the first part have have hereunto set their hands and seals the date above written.

John T. Coolidge. [seal]
Seth A. Coolidge. [seal]

Acknowledged in due form.

The respondent, Elliott, appeared by counsel and filed a demurrer to the bill for want of equity, which the Court after argument sustained, and rendered a decree for dismissing the bill and costs against the complainants.

Assignment of Errors.

In the Supreme Court of the United States.

Andrew L. Robinson and Julia R. Sloan vs. Thomas M. Elliott, Assignee of John T. Coolidge surviving partner of J. T. & S. A. Coolidge.	**Appeal from the Circuit Court of the United States for the District of Indiana.**

Said appellants say that there is manifest error in the record, decree and proceedings in said cause, in this, to-wit:

1. Said Circuit Court sustained the demurrer to the complainant's bill of complaint, whereas by the law of the land said demurrer ought to have been overruled.

2. Said Circuit Court rendered a decree dismissing said appellant's bill of complaint, whereas by the law of the land said said decree should not have been rendered.

3. Said Circuit Court rendered a decree against the said appellant for costs, whereas by the law of the land said decree should not have been rendered.

ASA IGLEHART,
Counsel for Appellant.

ARGUMENT.

The action of the Circuit Court in sustaining the demurrer to the bill and rendering a decree dismissing the same are the errors complained of, and for which we seek to reverse the decree.

The questions presented for consideration here all arise upon the construction of the mortgage of which we have set out a copy in the abstract.

The effect of the ruling of the Circuit is to hold the mortgage *absolutely void.*

Three grounds of objection are taken to the validity of the mortgage. First, that the description of the goods is bad for uncertainty. Second, that the provision in the mortgage authorizing the mortgagor to continue in possession of the mortgaged goods and dispose of them at pleasure, and to substitute other goods for them until condition broken, and the admission in the bill that he did so remain till long after the condition was broken, renders the instrument void; and Third, admitting that the mortgage is valid as to the goods in the store at the time of the execution of the mortgage, still, as to the after acquired goods it is void.

On the other hand we insist in support of the appeal that the mortgage is valid as to the whole of the property. The question of the sufficiency of the description was insisted on below, but we think will hardly be earnestly pressed here.

We think very clearly the mortgage contains all the description that is necessary. It is said in Lawrence vs. Evants, 7 Ohio St., 192, that "the principle to be deduced from the cases is that any description which will enable third

persons to identify the property, aided by inquiry, and which the mortgage indicates and directs, is sufficient." The identity of the property is not in such cases ascertained by any specific description which distinguishes it from other property but by its locality." See also to the same effect Duke vs. Strickland, 43 Ind. 494, citing 4 Maine, 561; 46 Id. 293; 60 Id. 118; 17 N. H. 443; 12 Met. 333; 10 Allen, 518; 10 Gray, 334; 9 Allen, 245; 14 Allen, 222; 15 N. H. 529; 25 Maine, 414, 24 Id. 104; 4 Met. 306; 12 Wis. 243; 1 Den. 580; Mitchell vs. Winslow, 2 Story, p. 630.

The question in controversy here being one of property, and being to some extent governed by statute, this Court will, in determining the legal validity of the instrument, have regard as well to the statutory provisions, as to the decisions of the Supreme Court of this State, under the Judiciary Act of 1789. Beauregard vs. N. Orleans, 18 How. S. C. R. 498.

The statutory provisions upon the subject found in our statute of frauds, (1 G. & H. R. 351) sec. 10, read as follows:

"SEC. X. No assignment of goods by way of mortgage "shall be valid against any other person than the parties there- "to, when such goods are not delivered to the mortagee or "assignee, and retained by him, unless such assignment or "mortgage shall be acknowledged, as provided in cases of deeds "of conveyance, and recorded in the Recorder's office of the "county where the mortgagor resides, within ten days after the "execution thereof."

"SEC. XXI. The question of fraudulent intent in all cases "arising under the provisions of this act, shall be deemed a "question of fact, nor shall any conveyance or charge be ad- "judged fraudulent as against creditors or purchasers solely "upon the ground that it was not founded on a valuable con- "sideration."

These are all the provisions of the statute which bear upon the question.

It is manifest from the reading of these sections of the statute that the Legislature of Indiana intended, while guarding against the perpetration of frauds, to permit the

use of personal property by way of chattel mortgages as a security for the payment of debts, in the same manner that real estate is used for that purpose, and that questions of fraud, which might arise under the law, should be questions of *fact* and not of *law*. Here are two material changes in the law: 1st, Chattel mortgages were unknown at common law, 10 Ind. Rep. 30; and 2d, All questions of fraud are questions of fact to be left to the jury.

Previous to the enactment of this statute of registration, it was necessary to the validity of chattel mortgages that there should be a manual delivery of the mortgaged property to ihe mortgagee, who should continue to hold the same in his possession, but under this statute the record of the mortgage is substituted for such delivery, and is full and complete notice to all the world of the rights and interests of the parties. Wright vs. Bundy, 11 Ind. Rep. 398; Duke vs. Strickland, 43 Id. 494. See also to the same effect, 1 Story Eq. Jur. sec. 403; Forbes vs. Parker, 16 Pick. 462; Bullook vs. Williams, Id. 33.

It is much to be regretted that the questions under discussion here have not been more fully and clearly determined by our own Supreme Court. But we shall insist that the rulings which have been made are all in our favor, and settle these propositions. 1. Where the mortgage has been duly recorded in time, the same is *prima facie* valid. 2. Where the mortgage is recorded and contains such a provision as the one in the mortgage here, it is still *prima facie* valid, and the question of fraud is a question for the jury. In other words, that there is no such thing recognized in our courts in this class of cases as fraud *per se*. 3. That where a mortgage is made in terms to include after acquired property, the mortgage will attach to the property when it is acquired, and will operate as a lien upon it in equity.

In Maple vs. Burnside, 22 Ind. 139, the Supreme Court of Indiana have decided the *precise question* under consideration. The main question before the Court was, whether

Maple, the attachment defendant had sold, conveyed or otherwise disposed of his property with the intent to cheat, hinder or delay any of his creditors. The fact of fraud relied on was the making of a chattel mortgage permitting the mortgagor to remain in possession of the goods and deal with them as his own. It will be observed, when we come to examine counter authority, that the cases relied on by the appellees hold that it is totally indifferent whether the permission to deal with the goods be as in the case at bar or whether the permission be given outside the mortgage as in the case we are referring to.

The Court below, among others, gave the following instruction:

"3. If, after the mortgage was given, the defendant remained in possession of the property mortgaged, after the time named in it, using and trading with the property as the owner, it is a fraud and you must find for the plaintiff."

In delivering the opinion of the Court, Hanna J. says:

"It appears to us this instruction was calculated to confuse and mislead the jury to the prejudice of the defendant. † † If it was intended to say that the defendant could not hold possession after the date of the mortgage, it is certainly erroneous. If some other point of time was intended to be indicated at which the possession of the defendant should cease to be rightful, it should have been more specific, especially in view of the fact that the date when the debts secured by the mortgage were to become due is not stated particularly, and the right to retain said possession was to remain in the mortgagor until the maturity and failure to pay said debts. The question of the rights of the mortgagor in said property whilst thus in his possession is discussed at length. We shall not follow learned counsel in that discussion, having come to the conclusion in view of the evidence that the instruction was calculated to mislead the jury, &c. † † † The statute is that fraud is a question of fact for the jury. The most natural construction of this charge would be, that if the jury should find that the facts existed alluded to therein, then, whether they constituted fraud or not, was not for the jury to determine but was for the Court, and established fraud."

And so the case was reversed for the error contained in this instruction.

It must be admitted that this opinion is wanting in

perspicuity, both in the statement of the law and the facts. But the record very clearly shows that the validity of the mortgage was in question. That the Circuit Court had assumed in its instruction, just as the Circuit Judge has decided here, that if the mortgagor after the mortgage was executed, kept possession of the goods and sold and dealt with them as his own, the mortgage would be fraudulent and void. It is equally clear that the Supreme Court reversed the judgment of the Circuit Court for the reason alone that this instruction was erroneous, upon the express ground that such dealing with the goods did not constitute *fraud in law*, deciding that under the 21st section of the statute, *supra*, the question was one of fact for the jury and not one of law for the Court, the facts being assumed.

In Chissom vs. Hawkins, 11 Ind. 316, also in Coe vs. McBrown, 22 Ind. 252, the Court not only hold a mortgage upon after acquired property good, but in the latter hold it good upon firewood in possession of the mortgagor which he was using and consuming as his own the SupremeCourt holding that a lien byway of mortgage for property not *in esse* is good in equity and will be enforced when the property becomes *in esse*, citing in the former case Smith's Mercantile law 693, and Mitchell vs. Winslow, 2 Story's R. 630, of which more hereafter. This of course establishes the position that if the mortgage be not absolutely void, as we contend it is not, it is valid as well as to after acquired property as that which was owned by the mortgagor when the mortgage was made.

If then we are right as to what is the law in Indiana upon this question, and the mortgage, as we insist is to be settled by the law of Indiana, we might rest the argument here. But learned counsel for the appellee insist, upon the authority of decided cases, in other States in the Union, that the mortgage is invalid and that, therefore, the decision of the Circuit Court is right.

We concede that there is a conflict of authority in the different States, it will therefore be necessary for us to ex-

amine the decisions to some extent, and before proceeding we submit that taking into consideration the different statutory provisions of the several States, the preponderance of authority is with *us* outside of the State of Indiana.

We will first briefly refer to the cases which sustain the mortgage in other States and then proceed to consider the counter authorities relied upon.

The case of Mitchell vs. Winslow et. al,, 2 Story, Rep. 630—648 is a case *directly in point in several particulars.* That was a case in equity, between the mortgagee and the assignee in bankruptcy, arising on a mortgage duly recorded, according to the statute of Maine, creating a lien upon property *in esse*, "tools, stock in trade, &c., and also upon similar articles, bought, made or added to the stock after the the date of the mortgage." Mr. Justice Story after a full argument of that branch of this case, in giving his opinion uses the following language, p. 644. (See also the authorties cited, note 1, p.644.)

"It seems to me a clear result of all the authorities, that " whenever the parties, by their contract, intend to create a " positive lien, or charge, either upon real or personal property, " whether then owned by the assignee or contractor, or not, or " if personal property, whether it is then *in esse* or not, it at- " taches in equity as a lien or charge upon the particular prop- " erty, as soon as the assignor or contractor acquires a title " thereto against the latter, and all persons asserting a claim " thereto, under him either voluntarily, or with notice, or in " bankruptcy."

The learned Judge is equally clear and decided upon the other part of the case, that the possession of the property by the mortgagors for the term of four years, with the right to receive the rents and profits, and to dispose of the stock, and sell, use, and trade with the same as their own—is a constructive fraud upon their creditors—the learned Judge further says:

" And as to chattels, there is as little question, that, when " a mortgage or a lien is created on chattels by contract, it is " entirely competent for the parties to agree, that the posses- " sion and the use thereof shall be retained by the mortgagor " until the breach of the condition, or by the debtor until the

" creditor shall assert his rights against it as a security for the " debt * * * under the statute of Maine for the recording " of mortgages of personal property [act of 1839, ch 390,] when " the mortgage is recorded it is valid without possession of the " property mortgaged being delivered to the mortgagee; and a " stipulation that it shall remain in possession of the mortgagor " until breach of the condition has been upheld as within the " true spirit and intendment of the law * * *

" In the case of Abbott vs. Goodwin, 20 Maine Rep. 408, it " was expressly decided that if the mortgagor should under a " stipulation in the mortgage, giving him that authority, sell " the mortgaged goods, and with the proceeds should purchase " other goods, the latter goods should represent the first, and " be substituted for them, and would be, equally with the first " subjected to the lien of the mortgage, citing 14, Pick, 497 and " Hawthorne vs. New Castle and North Shields R. R Co., in " cross on lien appendix 408. * * *

"The mortgage was recorded and there is no ground to sug- " gest any intentional concealment. The possession of the " property by the mortgagor and the power to use and dispose " of it, was not only consistent with the deed, but was " positively avowed and provided for by it, the creditors " therefore, were not allured by any false colors or false credit " held out to mislead them. Now I am not aware of any " policy of the law, or of any principle of the law which " makes any conveyance of this sort invalid as to creditors " if they have full notice of it, or may have full notice of " it, by the exercise of diligence. Indeed, the law makes the " registration of the deed constructive notice of its contents to " all persons since it was required to be registered in conformi- " ty to law. What ground is there then to assert that the con- " veyance was against the policy of the law? The phrase itself " is somewhat indefinite, and in its actual application here, is " difficult to comprehend. I profess that I am not able to per- " ceive any; and, as far as authorities go, they point the other " way. Besides; the assignees here stand before the court af- " fected with all the equities of the original debtor; and the " creditors here assert their rights through and under the as- " signee and not by any paramount title.

In applying the reasoning of Judge Story to the case at bar it should be remembered that the law of recording chattel mortgages in Maine and in Indiana are the same. The law in the State of Maine, as copied from the appendix, 2 Hilliard on Mort. p. 609, is as follows:

"SEC. 1. No mortgage of personal property for more than " thirty dollars, shall be valid against any other person than

" the parties thereto, unless possession is delivered to and re-
" tained by the mortgagee, or the mortgage is recorded by the
" clerk of the town in which the mortgagor resides. Rev. Stat.
" Maine 1857, p. 569."

In Abbott vs. Goodwin, 20 Maine, p. 408, the court decided that if the mortgagor sell the goods, and with the proceeds thereof purchase other goods, these last represent the first, and are substituted for them and are equally subject to the lien of the mortgages thereon, citing Macomber vs. Parker 14, Pick. 497. See also 49 Maine, R. 561, 42 Id. 132—25, Id. 8.

The law of mortgaged chattels in the state of Michigan is very similar to that of Indiana and is as follows:

" Every mortgage of goods and chattels shall be absolutely
" void as against the creditors of the mortgagor unless the
" mortgage shall be filed in the office of the township clerk
" where the mortagor resides."

In Oliver vs. Eaton, 7 Mich. Rep. 108, the provisions of the mortgage, and very many of the facts were similar to the case at bar. A drug store had been mortgaged by Eaton and was left in his possession by the mortgagee to buy and sell which he did until it was levied on by the sheriff for the debt due at the time the mortgage was given.

Campbell, J. says: " The question of intent, and not merely
" the facts from which it may be inferred, is declared to be a
" question for the jury. The Statute must have some meaning,
" and it was undoubtedly introduced to create or settle a rule
" of law * * * The statute uses language very well calcu-
" lated to settle this doubt, and it ought to be constructed in
" such a manner as to carry out the intent appearing on its face."
* * * " It is quite proper for a court to call the
" attention of a jury to all the facts bearing upon the good faith
" of the transaction, but it was evidently the intention of the
" statute to abolish the arbitrary rules which different courts
" had laid down, whereby honest instruments had sometimes
" been annulled and dishonest ones upheld. By leaving each case
" to the jury, each instrument is made to stand upon its own ac-
" tual merits; which is much safer in questions of fraud: whose
" manifestations are infinitely various, than the adoption of
" fixed rules, which must fail to meet numerous cases."

I Gay vs. Bidwell, Id. p. 520, this doctrine is held and numerous cases cited by the court. Campbell, J. in delivering the opinion of the court says:

"That the instruments which have been declared void upon "their face have been most frequently general assignments by "insolvent debtors." * * * "And it has always "been a cardinal rule, never to infer a dishonest meaning, if "an honest one is possible, and consistent with the whole tenor "of the instrument, Nye vs. Van Husan, 5 Mich 329." * * "A debtor may secure or pay any creditor at his option, and "may use any property he pleases for that purpose."

"There exist, therefore, very strong reasons applicable to "the construction of assignments which do not apply to other "instruments. And while we are not inclined to lay down "any rule of absolute exclusion, we are satisfied that, outside of "assignments, the cases proper for declaring the existence of a "fraud in law, which cannot be explained or disproved are not "frequent, and when Judge Mullit in Griswold vs. Sheldon, 4 "comst. 580 [after demonstrating that all the presumtions raised "upon a chattel mortgage are disputable and not conclusive] asks: "how then can a chattel mortgage be void upon its face, "unless it contains an admission that it was made to defraud "creditors?" he puts questions not easily answered, p. 220 1

* * * * * * *

"The recording law enables all vigilant person to ascer- "tain the existence of such securities. Many small merchants "especially beginners in business, have no other means of secur- "ing their creditors for the stock they purchase, and can only "meet their debts per by current sales. * * * To "hold that a merchant cannot mortgage his goods without clos- "ing his doors, would be to hold that a chattel mortgage is "worthless."

The statute of Iowa is as follows:"

"SEC. 2201. No sale or mortgage of the personal property when the vendor or mortgagor retain actual possession thereof is valid against creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed and acknowledged like conveyancee of real estate, and filed for record with the recorder of deeds for the county where the holder of the property resides."

Laws of Iowa 1860, p. 388.

"Section 2203 provides that when recorded the sale or mortgage shall have the same effect as though it had been accompanied by actual delivery of the property so sold or mortgaged."

In this statute we have another step in advance, in the effort to use personal property by way of mortgage as a security for the payment of debts. In a case which arose out of a chattel mortgage, Torbet vs. Hayden, 11 Iowa 435.

The court Lowe, C. J. say that "naked possession without "the power of use or sale would be a *barren* right equally pro-

" ductive of mischief to both parties, tying the hands of the " debtor. and suppressing all effort to realize from the property " money requisite to extinguish the debt."

See also Campbell vs. Leonard Id. 489.

In Hughes vs. Cory, 20 Iowa 399 the supreme court again discussed this subject upon a chattel mortgage of a stock of goods, the facts of which are in many particulars very similar to the case at bar. Dillon J. in delivering the opinion of the court uses the following language:

" That such an instrument would, by the English court be " deemed fraudulent at common law and under the 13 Eliza- " beth both, because the mortgagor was allowed to retain pos- " session and make sales from the goods, must be admitted. Tur- " ners case 1 Smith Lead. Cases with English and Amer. notes " 2 Kents com. 516-53. And in most of these American states " such an instrument would be treated as being at least pre- " sumptively fraudulent. This rule, deducing fraud as a con- " clusion of law from the simple retention of possession by the " vendor or mortgagor, originated in England in a very early " day, when there were no registry laws, or none requiring such " instruments to be registered. It was founded upon public " policy, that policy was to prevent a party from acquiring a " false and deceptive credit on the strength of the possession of " property which he had sold or mortgaged, and yet of which " he retained the possession, enjoyment and apparent ownership. " The statute of 13 Elizabeth did not declare that such reten- " tion would be fraudulent. This was a doctrine of the courts. " And the ground of the common law policy which was to pre- " vent *secret* transfers of property is thus (by requiring transfers " unaccompanied by change of possession to be recorded,) re- " moved. To secure notoriety, and to protect creditors and " purchasers, the statute makes precisely the same provisions as " in relation to the transfer of *real* property; and the record of " each is presumed to be known to all. The mere retention of " of possession when the instrument is recorded is therefore no " longer either *per se* fraudulent, or a badge of fraud *in law*. It " may be a circumstance with others to prove fraud *in fact* p. 403.

* * * * * * *

" But if the debt be real, and the creditor in good faith, " desires security, what objection is there in reason, to just such " a transaction as that which is declared in the mortgage now " before us? The debtor is a merchant. He cannot pay at ma- " turity. He wishes time to dispose of his goods in the usual " way, and to secure that, and to prevent a sacrifice at forced " sale, is willing to give one of his largest creditors a mortgage " on his stock. There is no law, as perhaps there should be,

requiring him to assign for the benefit of his creditors generally; " nothing to prevent one or more of his creditors from sueing " and attaching his goods, and nothing to prevent his electing " (a right which the law allows) to give one or more of his " creditors a mortgage. He is acquainted with the stock, has " a business established, and can probably dispose of the goods " more advantageously. both for himself and his creditors, than " the mortagee could himself do, if he should take possession.

In this opinion C. J. Dillon overrules his dissenting opinion given in Torbet vs. Hayden, 11 Iowa 435. See also cases cited by the learned Chief Justice on page 403.

The statutes of Massachusetts upon the subject of chattel mortgages are substantially like those in Indiana.

The decisions, however are not entirely in conformity with the rulings in Indiana upon the points under discussion. There are two exceptions; the Massachusetts authorities hold that property not *in esse*, or after acquired property does not pass by a mortgage, but that as to it, such a mortgage, is void and that possession in the mortgagor is a badge of fraud

The case of Briggs vs. Peckham 2 Met, 258. Jones vs. Huggeford 3 Id. 515. Banhard vs. Eaton, 2 Cush, 294 Goodman vs. Freeman 3 Id. 306, are leading cases.

Briggs vs, Peckham is very much in point here.

We quote from the statement of facts:

"The following report of the case was made by Morton J., before whom it was tried: On the 6th of July, 1869, said Loring, in consideration of a loan of $3,500 and the transfer to him, by said Parkham, of certain leases, agreed to give his promissory note to said Parkham for $5,800, payable in sixty days, with interest, and a mortgage to secure payment thereof of the principal part of said Loring's stock in trade in Boston, he to continue in possession, and make sale of said mortgaged stock in the ordinary course of business and apply the proceeds to his own use During the negotiation, which preceded this agreement, said Loring declined to account with said Parkham for the proceeds of said sales, stating that he should not at that season make any large sales, and that if he should, he would add to said

Parkham's security by other property; that he contemplated a new arrangement with a person who was to be his partner, and who was to advance money within a short time; and that he, (Loring), would endeavor to pay half the said note in 30 days. The parties thereupon agreed, as above set forth, and also that said Parkham should examine the amount of sales at the end of thirty days, for the purpose if necessary of obtaining further security; and the note and mortgage were thereupon executed and delivered by said Loring. The nominal amount of the schedule annexed to said mortgage was $9,115 42. After a provision that the deed of mortgage should be void, if said Loring should pay said note with interest in sixty days the instrument concluded thus: "Provided, also, that until default of, or in the payment of said sum, $5,800 and interest, it shall and may be lawful for said Loring, his executors, etc., to have, retain in his possession and use, all and singular, the propty mortged as aforesaid, without the hindrance or interruption of said Parkham or his assigns"

Uupon this statement Mr. Justice Wilde delivering the opinion of the court proceeds:

"The counsel for the assignee maintains, that this agreement vitiated the mortgage, and rendered it void as to the creditors of Loring, that such an agreement is fraudulent in law, or is conclusive evidence of fraud, not open to explanation, however fair and honest the intention of the parties may have been. In regard to the objection in relation to that part of the agreement respecting the mortagor's continuing in possession of the mortgaged property, the law, as it is in this commonwealth, has long been well established, and it is no longer open to discussion. It has always been held by this court, that where a vendor continues in possession of the goods sold, after the sale, with the consent of the vendee, such a possession is only a badge or presumptive evidence of fraud, which it is proper to submit to a jury and which may be explained, and the inference of fraud repelled by other evidence. On this ques-

tion there have been many conflicting decisions in other courts; but the question is now settled in the state of New York, in conformity with the doctrine held in this commonwealth and such appears to be the doctrine as now held in England. Bissell vs. Hopkins 3 Cow. 166, Seward vs. Jackson 8 Cow. 406. Kidd vs. Rawlinson, 2 Bos, & Pull 59. Martindale vs. Booth 3. Barn and Adolph, 498. Hinde vs. Longworth, 11 Wheat, 199. Arundell vs. Phipps 10 ves. 14 Latimer vs. Batson, 4. Barn & Cress, 652.

"In the case of Bissell vs, Hopkins it was settled, after an examination of the principal authorities, that the possession of goods remaining in the vendor after the sale, was only presumptive evidence of fraud, which might be explained by other evidence.

"And we do not understand the counsel for the assignee to deny the doctrine thus established, but he relies on the other part of the agreement which he insists is not merely a badge of fraud, but that it vitiated the security and rendered it void *per se* as to creditors. But we consider the agreementas to the mortgagor's continuing in possession of the goods mortgaged, after the mortgage, and the permission to sell a part of the property, and to apply the proceeds to the mortgagor's own use as evidence of the same character and as tending to raise the same presumption; the one part of the agreement may raise a stronger presumption of fraud than the other, but this is a difference only in the weight of the evidence. Both parts of the agreement tend to prove a fraudulent intent, but both may be explained consistently with honest intentions and fair dealing; and if they may be so explained and the inference of a fraudulent intent repelled, there seems to be no reason for excluding the explanatory proof. It has been argued that the necessary consequence of the agreement was to deceive and defraud the creditors of the insolvent debtor, and that a party must always be presumed to have intended that which necessarily must follow from his act. But it is not a necessary consequence of the agreement that creditors would be

defrauded; and even if that were the necessary consequence of the agreement, it would not follow that such a presumption might not be rebutted by evidence."

"The question to be decided is, whether the mortgage deed was given with a fraudulent intent to cover the property and thus delay or defraud creditors; and the question is to be determined by the whole evidence. presumptive and explanatory. In Cadogan V. Kennett cowp. 433, Lord Mansfield says that "the statute does not militate against any transaction *bona fide*, and where there is no imagination of fraud. And so is the common law. The question, therefore in every case, is whether the act done is a *bona fide* transaction or whether it is a trick or a contrivance to defraud creditors."

We submit that this argument is unanswerable and directly in point.

Barnard vs. Eaton is to the same effect, the description being general without invoices, as in the case at bar, and containing similar provisions, for possession, sale etc. by the mortgagor and the court hold the mortgage valid.

So then it is settled in Massachusetts that the retention of possession by the mortgagor, and a provision in the mortgage, or the permission outside of it, authorizing the mortgagor to sell and use the property as his own, are alike badges of fraud, yet neither constitutes the mortgage fraudulent in law, and if the other facts show the transaction to have been fair and honest, it will be sustained notwithstanding either or both of these things.

And although these cases adopt a different theory as to the effect of a recording as a substitute for possession, still in the case at bar, the allegations in the bill are that the mortgage was made for an honest purpose, denying all fraud, and under the ruling in Massachusetts the demurrer should have been overruled, the record, as it does, showing all absence of fraud in fact.

But in this court the doctrine, that continued possession of the goods by the mortgagor, where the mortgage is recorded is a badge of fraud, has not been recognized.

In Fowler, et al vs. Merrill, 11 How. 375. It appeared in evidence that Dawson, the mortgagor of a number of slaves on his plantation in Arkansas, remained in possession of the property, and had the use of them for four years after the execution of the mortgage, and until after they had been seized and sold on execution as the property of Dawson, the sale having been made while they were in his possession. Mr. Justice Woodbury in delivering the opinion of the court said:

"But it is unnecessary to decide any of these points here, "as, in order to prevent any injury, or fraud, by the possession "not being changed, a record of the mortgage is in most of the "States required, and was made here within four or five weeks "of the date of the mortgage, whereas, the seizure and sale of "the negroes to the respondents did not take place till nearly "four years after, p. 392.

Thus repudiating the doctrine that such possession by the mortgagor was a badge of fraud in case of a recorded mortgage, and recognizing the doctrine held in all the States, perhaps, save New York, that recording is a substitute for change of possession.

To add to the array of authorities already cited, it may be stated, that in New Hampshire and North Carolina, it is held that the possession and use of mortgaged property by the mortgagor, does not render a chattel mortgage fraudulent.

The statute of New Hampshire provides, 1st, that personal property and crops of every description are subject to mortgage.

"SEC. 2. Possession of the mortgaged property must be "delivered to, and retained by the mortgagee. or the mortgage "must be recorded in the office of the clerk of the town in "which the mortagor resides at the time of making the same. "Rev. stat. 248, 133."

In North Carolina the same provisions are made as to the registration of mortgages of real and personal property. 1 Rev. Stat. 376, C 65, cited from appendix, 2 Hilliard on Mort.

We do not attempt to disguise the fact, that in several

of the states a contrary doctrine has been held. In some of these states the peculiarities of the statutes upon the subject, as well as the construction given them by the courts, has had a controlling influence in determining the course of decision upon this question.

We propose, therefore, to examine the grounds of some of the leading cases, relied upon by counsel for the appellee.

The cases relied upon by counsel, go upon the theory, that the provision in the mortgage permitting the possession and disposition of the property by the mortgagor or such permission by the mortagee, *de hors* the instrument, constitute *fraud in law.* or *fraud per se.*

Several reasons are assigned by the different courts for this view. It is insisted by some of the Judges that these provisions are against public policy. By others it is said that such contracts and transactions tend to hinder, delay and defraud creditors. By another class it is said specificially that snch an instrument tends to hide away the the property of the mortgagor and permit him to keep other creditors from subjecting it to execution, and that at the same time it permits the mortgagor to sell for his own use and dispose of the proceeds at his pleasure, thereby serving to defraud his creditors. It is by others contended that a mortgage with such a provision is in fact no mortgage at all, because the provision is repugnant to the very idea of a mortgage, that while it purports to be a security for the debt it permits the mortgagor to defeat the very object and purpose of the mortgage at his pleasure.

If these arguments were used for the purpose of showing that mortgages of this character gave opportunity for perpetration of frauds, and should therefore be carefully scrutinized, or that they constituted an unsafe and inferior security, or even if it should be held as in Massachusetts that such a provision was a badge of fraud, some slight foundation in reason might be found in any one of these positions. But when it comes to holding an instrument containing such a provision necessarily *fraudulent*

and void and not susceptible of being sustained by allegation and proof of the utmost good faith, we submit that the argument is without rational foundation. Let us look at these several reasons in their order:

1. Such provisions are against the policy of the law, or against public policy in the language of some of the learned Judges.

The policy of the law favors such transactions as promote commerce, and enable poor but honest merchants to strengthen themselves by a mortgage upon their stock, honestly made, whereby they obtain means or credit to carry on their business.

2. The provision is a fraud upon the general creditors. If by this is meant, that it is a preference, we concede it, and all preferences have a tendency to hinder or delay creditors, but if honestly made, and not in conflict with the bankrupt law, as this was not, they are valid.

And that a mortgage in this form is any more obnoxious to this objection than any other preference, is not perceptible.

3. As to the charge that it covers the property and prevents other creditors from levying, this argument is without significance in Indiana, where the property might be levied upon and sold subject to the mortgage. So here if the mortgage is actually fraudulent it may be disregarded, and if valid the equity of redemption is subject to sale on execution. Coe vs. McBrown 22 Ind., 257. Hamberger vs. Boyd, 18 Ind. 420. Shrader vs. Wolflin, 21 Ind., 231.

But in reference to these objections, we have been noticing, we need not spend further time. We refer to the opinions of Mr. Justice Story in Winslow vs. Mitchell *supra* and the other opinions of the judges quoted above in Michigan, Iowa, Massachusetts and Maine, in the cases above cited.

4. But the objection that the provision is repugnant to the object of the mortgage and *renders it of no value*, is novel, and merits special attention; to this we answer:

1. It is true the mortgagor may prove to be dishonest and may convert the property to his own use, but the record does not show any such fact—besides the law presumes that he will act fairly.

2. We are not discussing the goodness or value of the mortgage, but only its validity.

3. That by virtue of this mortgage the appellants have obtained possession of the goods in controversy, which they now hold.

4. That the record shows that the mortgagor has sold a part of the mortgaged goods and has replaced them by other goods.

And therefore the law will not adjudge an instrument void *per se* because of the smallness of its value in any case, where it may be beneficial to the party for whose benefit it is intended, if honestly carried out according to its terms.

Foremost among the cases relied upon by the appellees to show the invalidity of this mortgage are those in New York.

Before examining the rulings of the New York courts, we insert the provisions of the statues of that state, bearing upon the subject. The 5th section of the New York statute of frauds is as follows:

"SEC. 5. Every sale made by a vendor of goods and chat-
" tels in his possession, or under his control, and every assign-
" ment of goods and chattels by way of mortgage or security,
" or upon any condition whatever, unless accompanied by an
" immediate delivery, and followed by an actual and continued
" change of possession shall be presumed to be fraudulent and
" void, as against creditors, or subsequent purchasers in good
" faith; and shall be conclusive evidence of fraud, unless it
" shall be made to appear, on the part of the persons claiming
" under such sale or assignment, that the same was made in
" good faith, and without any intent to defraud such creditors
" or purchasers. N. Y. Rev. Stat. vol. 2, p. 195—6, 1830.

In 1833 the legislature passed an act providing that chattel mortgages should be void, etc., unless they were filed with the town clerk. S. 1833, p. 402.

Now, although this latter act is substantially like

most of the other statutory provisions in the other States, Indiana, Michigan, Massachusetts and other States where recording is held by the several State courts and by this court to be a substitute for a change of possession, still the New York Supreme Court held in Wood vs. Lowry that so far from recording being a substitute for change of possession, that the continued possession of the goods, notwithstanding the mortgage was recorded under the act, constituted fraud in law, adding that this law (the recording act) only added another reason to those already existing for declaring chattel morgages void!!

In Smith & Hoe vs. Acker 23 Wendell 652, Wood vs Lowry is overruled as to the effect of possession, and it is there held that the question of fraud is one for the jury and not for the court, and the whole doctine of *fraud in law* is repudiated, even in this case it is held, that under the statutes the presumption of fraud conclusively follows possession of the mortgage, notwithstanding the recording of the mortgage, unless the possession is explained.

It will be observed that in Wood vs. Lowry the *continued possession* of the goods by the mortgagor, and the permission to dispose of them by him, are treated alike as badges of fraud, both alike conclusive.

And when by the case of Smith vs. Acker this doctrine was exploded by the court of appeals, as to the effect of possession in the mortgagor no reason is perceived, why the case is not equally applicable to the other alleged badge of fraud, viz. the power to dispose of the property.

And no sufficient reason is assigned why even in New York as in Massachusetts the courts did not hold if, the transaction was fair and honest, it would be valid in either case., In other words it is not easy to see why if these two things viz: possession and the right to sell, were both badges of fraud, and if the question of fraud was one of fact and not of law, as ruled in Smith vs. Acker, the same court should afterwards still insist that one of these *badges of fraud* constituted *fraud* in *law*.

The fact is, the whole course of decision of the New York courts, upon the subject, is unfriendly to chattel mortgages. In Wood vs. Lowry *supra*, the supreme court held possession and the right to sell in the mortgagor both conclusively fraudulent in law. In Smith vs. Acker, *supra*, the court of appeals overruled Wood vs. Lowry upon the former proposition, the other not being involved, and held that possession was a badge of fraud, being one of fact but that the *bona fides* might be proven.

In Griswold vs. Sheldon, 4 N. Y., 581, the same court divided equally upon the question of the power to sell in the mortgagor, as a *fraud in law*, and decided the case upon other points. But in 9 N.Y. 213, the court decided that such right to sell was a fraud in law, and not subject to be explained by the evidence, attempting to distinguish it from Smith vs. Acker, and this case is again followed in 19 N. Y., 123, and 37, Id 591. (Russell vs. Minor)

While in 25 N. Y,, 359, 28 Id. 360, and 32 Id, 293 it is held that a power of sale by the mortgagor may be valid if it require the proceeds of the sale to be applied to the mortgage debt.

We confess our inability to see the distinction attempted to be made, and we submit that it is wholly arbitrary and without foundation in reason. In the one case the mortgagee reserves the lien but gives the mortgagor the right to keep possession, and sell and replenish his stock and keep his security good, reserving the right to seize the goods if default be made in the condition of the mortgage, while in the other, he is permitted to do the same thing only instead of having the right of replenishing, he is driven to sell out and quit business if he makes a mortgage—and why need the one be less a fraud upon the creditors than the other? In the former case if the parties act honestly the transaction may be beneficial, and the transaction if not *bona fide* of course is fraudulent, in fact, while in the latter case there is the same temptation to fraud as in the former, and the rights of creditors are no more protected.

The only difference, being that in the one case the business may be continued, while in the other case it must be broken up.

But we insist that the whole of the New York rulings are based upon theories never countenanced either by the courts in Indiana or by this court.

The reason why the continued possession of the goods by the mortgagor was formerly held a badge of fraud, was, that the mortgagor procured ficticious credit upon property he did not own. In this court and in the supreme court of Indiana and in most of the other states as we have seen the recording of the mortgage is held a substitute for a change of possession, and therefore this objection is obviated. And yet, notwithstanding, this objection to the mortgagor's possession in case of a recorded mortgage, is thus obviated and notwithstanding, all other courts so hold, still the New York courts, by sheer unfriendly construction, hold it still a badge of fraud.

Again. In Russell vs. Winne, *supra* one of the strongest reasons urged by the court for holding the mortgage void in law, is that it provides that its lien shall attach to *after acquired* property. While this court, in Pennock vs Coe, 23 Howard, 117, gives the very fullest sanction to the validity of a mortgage on after acquired property, citing Winslow vs. Mitchell and many English and American cases. And while the supreme court in Coe vs. McBrown 22 Ind., 252, in the case of a railroad mortgage, providing that the same should attach to all locomotives etc., they should thereafter acquire, together with all the superstructure, and rails, and the *materials used thereon*, it was held that the mortgage attached to steam-wood which was cut and laid along the road, which was being daily used and consumed in the use, thereby recognizing the validity of a mortgage, both as to before, and after acquired property.

The objection urged in Russell vs. Winne that such a mortgage is "*no mortgage, creates no lien,*" would apply in this latter case with the greatest imaginable force,

in the case of fire wood, which the party has one day and and the next is consumed, and its place supplied by other wood: no security could be imagined, that would be more frail, yet the supreme court of Indiana hold the same valid for whatever it may be worth.

Will this court follow these New York rulings? Or, will it not rather follow the analogies of its own rulings in Pennock vs Coe and the other cases cited and the direct rulings of the supreme court of Indiana where the mortgage was made? The supreme court of Ohio has also in several decisions followed New York, upon this point that a mortgage containing a general provision authorizing the mortgor to sell the property, makes the mortgage void in law, while if it require the application of the sales to the mortgage debt it will be held valid,

Upon this point we need add nothing to what we have already said.

The cases in Illinois are also relied on by the appellee But a moments reference to the Illinois statutes and decisions, will show that the decisions in that State afford no precedent for the determination of the question in any other States having no such statutes. A section or two are here given as follows: Chapter 2 Sec. 1, "No mortgage on personal property shall be valid, as against the rights and interest of any third person or persons, unless possession of such personal property shall be delivered to and remain with the Mortgagee, or the said mortgage be recorded, as hereinafter directed.

Sec. 3. A mortgage duly acknowledged shall be recorded, and shall be good and valid for the space of two years—during which time the mortgaged property may be left in the possession of the mortgagor if the mortgage shall so provide.

Sec 5 prohibits the sale of mortgaged property by the mortagor to any third person without informing him of the existence and effect of said mortgage.

Sec. 7. 1861. Declares such sales, by the mortgagor,

without the written consent of the mortgagee to be a high misdemeanor with severe penalties.

1 Stat of Ill, p. 67.

In Covis vs. Ransom, 18 Ill, Rep, 396 the mortgage was held void for this reason, as stated by Skinner, J., page 402.

"The possession is to remain with the mortgagor, a sale to "the third person is prohibited. The chattels set forth in the "mortgage are to be entered and described in the Justice's "docket, and the mortgage is to be recorded." * * *

"This instrument does not provide for possession *remaining* "with the mortgagor, within the meaning of the Statute, but "seeks, under cover of a mortgage, to enable the mortgagor "in defiance of his creditors, to retail goods according to the "course of merchants, and is against the evident policy of the "statute."

In Read vs. Wilson, 22 Ill. 377 the mortgage was held void for the same reason. And in that State many cases to the same effect may be found, all decided under the same penal statute above quoted.

But as we have said, these cases are not authority here.

The decisions of the Supreme Court of Wisconsin are also relied on by counsel for appellee.

But, although their statutes are like those of New York upon the subject of continued possession, and a decided leaning toward the rulings in New York is shown, yet we have been unable to find a direct determination of the precise point.

In Place vs. Langwothy, 13 Wisconsin, R. 629, the court admit the conflict of authorities, and admit that it is impossible to reconçile them by any course of reasoning, or any principle of law, But hold the mortgage void in that case, because the mortgagor was expressly authorized to appropriate the proceeds of the sales of the mortgaed goods to the family expenses of the mortgagor—and therefore expressly put them out of the reach of creditors generally.

Since then, we do find that the point has ever been decided by that court.

In Place vs. Langworthy it is assumed that the Supreme Court of Missouri have followed New York upon this point. But we have not been able to avail ourselves of the the cases cited, since the commencement of this argument. However, this may be, we have perhaps sufficiently discussed the doctrine in that line of decisions.

But, however the validity of the mortgage may be determined, still the decree of the Circuit Court must be reversed. For it will not be denied for a moment, that it is competent for the debtor to deliver his goods in pledge, and if there is no violation of the provisions of the bankrupt act the pledge will be held good. No such violation is shown in the bill, and therefore the delivery of the goods to the complainants for the satisfaction of the debt is good as a pledge, and invests them with a valid possession in pledge for the debt, and the complainants had a right to bring their bill for the purpose of enforcing their lien, and the bill being good for such a purpose, the demurrer should have been overruled.

In conclusion we submit: 1. That upon principle, there is no just ground upon which a court of equity, can declare a contract by which the parties, in perfect good faith without actual fraud, agree to fix a lien upon property, the one for the security of his debt to the other, and for their mutual benefit void, unless there is some rule of law contravened, or unless the contract necessarily operates as a fraud upon third parties.

2. That none of the reasons declaring a mortgage, like the one at bar, fraudulent in law, are well founded, or consonant with the analogoies of the law, being reasons which apply as well to other transactions, held by all the courts to be consistent with honesty and fair dealing.

3. That upon authority, we marshal the opinions of such distinguished courts, and Judges as Mr. Justice Story, the Supreme Court of Maine, the Supreme Court of Massachusetts, with C. J. Shaw as its chief, the Supreme Court of Michigan, with Mr. Justice Cooly as its chief, the Supreme

Court of Iowa, with Mr. Justice Dillon as its chief And the Supreme Court of Indiana, in the State where, and under whose statutes the question arises. Together. with the addition of the analogies of the cases decided upon the question of chattel mortgages in this court, Against this are arrayed the vascillating and unsatisfactory rulings of New York, rendered under peculiar constructions of their statutes, the cases in Illinois, under their very peculiar statutes, and the cases in Ohio, and perhaps Wisconsin and Missouri, following the same line of argument.

4. The question of the validity of the mortgage, as to after acquired property if not abosolutely void in toto is not an open one in this court, having been fully discussed and decided upon authority in Pennock vs. Coe *supra*. It may be possibly said that the latter point is not involved in the demurrer, but we submit that it is, and if the mortgage is not held void in law, and the case is reversed, this point will arise on a final decree in the case.

5. But finally if the mortgage is held void in law, still the delivery of the goods in pledge vests a sufficient lien *primafacie* to enable the appellants to enforce their lien in equity.

For all these reasons we insist that the Circuit Court erred in the sustaining of the demurrer and the dismissal of the bill.

Wherefore, we ask in behalf of the appellants a reversal of the decree of the Circuit Court.

A. L. ROBINSON. *In propria persona.*
ASA IGLEHART, Counsel for Appellants

IN THE SUPREME COURT OF THE UNITED STATES.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

ANDREW L. ROBINSON AND JULIA R. SLOAN, (*Plaintiffs below*), } APPELLANTS,

VS.

THOMAS M. ELLIOTT, ASSIGNEE IN BANKRUPTCY OF JOHN T. COOLIDGE, SURVIVING PARTNER OF THE LATE FIRM OF J. T. AND S. A. COOLIDGE, (*Defendant below*), } RESPONDENT.

ARGUMENT FOR RESPONDENT.

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ARGUMENT FOR RESPONDENTS.

This is an appeal from a decree of the Circuit Court of the United States for the District of Indiana, dismissing a bill in chancery against the respondent filed by the appellants.

Counsel for the appellants, in the argument by which they endeavour to sustain the very remarkable instrument on which the bill is founded, seem to have

utterly lost sight both of *the tribunal to which*, and of *the mode in which*, the question at issue is presented.

The whole question in this case arises upon the right of the appellants to hold certain property of two brothers, named Coolidge, as against the respondent, their assignee in bankruptcy; the mortgage upon which the appellants seek to found their title being impeached as being fraudulent and void against creditors of the bankrupts.

The appellants set out the mortgage *verbatim* as a part of their bill, together with a full statement of all the concomitant facts and circumstances of which they deemed it necessary to place the court in possession to enable it to understand the exact position of their claim.

The respondent demurred to the appellants' bill for want of equity, contending, for reasons hereafter to be pointed out, that upon the appellants' whole case as made by their bill, there was, in equity language, a complete defect of title to maintain the suit. The learned judge (Mr. Justice Hopkins) who presided in the court below, after a very full argument on both sides, allowed the demurrer, and, as a matter of course, rendered a decree dismissing the bill with costs.

It is obvious, from a perusal of the appellants' brief, that its authors not merely complain of this decision on the merits, but seek to contend that the chancery judge was not free to go into the whole case and make a final disposition of the cause on the pleadings and issue presented to him. From whatever reason, they seem throughout possessed by the idea that the chancery judge should not have disposed of the case on demurrer, but should have disposed of it in some other way or manner, or at some other time or place; though how, or why, or when, or where, they are altogether unable to point out. This is more than half the burden of their complaint. They seem quite as much aggrieved at the

thought that the chancery judge decided the case against them then and there, as by the fact that he pronounced against them at all: and this grievance derives additional weight in their minds from their belief, that the statute of Indiana, which they cite, has, or ought to have, some bearing in support of that notion.

As no idea could be more erroneous, we shall make no apology for entering into a somewhat elementary argument to show (1) that the defendant properly raised the question by demurrer, and was indeed bound to do so; (2) that the learned judge properly made a decree on the whole case on the merits, and was bound to do so, and had no other course open to him; (3) that the statute of Indiana, cited by the appellants, has no earthly bearing upon the question. We conceive that a clear apprehension of the character of the court and the nature of the issue raised is of itself sufficient not only to displace the whole of the argument for the appellants, but absolutely to turn it against them, and to show that it contains principles decisive in favour of the respondents.

In the vast majority of cases in which similar questions have arisen in relation to personal goods, the matter has been litigated at common law, usually in an action of trover brought by either party against the other. It is almost impossible to open a volume of English common law reports without finding one or more of such cases. The form of the action is extremely concise and convenient. The declaration, in two lines, states that the defendant converted to his own use the plaintiff's property, describing it. The defendant, in two lines more, denies the alleged conversion, and adds that the goods are not the property of the plaintiff. Upon these simple pleadings issue is joined, and the case comes on for trial completely at large—the pleadings in no way disclosing the nature of the title claimed

tribunal, can be called in aid to declare with what forms or under what regulations the court of chancery shall administer its well settled system of equity jurisprudence. This fundamental doctrine is clearly explained in 1 Abbott's U. S. Practice, 2nd ed., at p. 462—3. Even the recent act of Congress (of June 1, 1872) providing for the adoption by federal courts of the practice, pleadings and forms of state courts, expressly excepts causes in equity and admiralty.

Now, courts of equity try causes without a jury, and it is a fundamental principle of those courts that the chancellor must decide every question of fact for himself. The object there aimed at is simply *a complete decree on the general merits* (Ad. Eq. 301), and where the matter in dispute is a point of law, or where the question for decision arises upon a state of facts which are not controverted, the decision of the court may generally be most speedily obtained by a bill intentionally so framed, as to be open to demurrer on that point. If all the facts are admitted, the court is bound to pronounce the same decree on demurrer that it would make if those facts appeared for the first time at the hearing. If it were not the wish of the plaintiffs to obtain the decision of the court in this manner, why did they depart from the settled rules of pleading, and directly contravene the 26th rule of practice in equity of this court, and frame their case so as not only to invite, but absolutely to compel a demurrer, by setting out their mortgage *in hæc verba* as a part of their bill?

The argument for the appellants is certainly an extraordinary one. From the first line of their brief to the last they completely ignore the principles, the practice, the very existence itself, of the court to which they have committed their clients' cause. We desire to treat with the utmost respect any argument preferred by learned counsel in behalf of their clients. But even if the case were in their own state court, or in a federal

court of common law, still, upon demurrer, the facts appearing as they do upon this record, either court would be just as much bound to pass upon the point raised as the court of chancery in the present instance. How, then, the inquiry, whether upon a trial at common law the judge in any particular case or set of cases invaded the province of the jury, can have the most distant bearing upon the decision of a question arising upon demurrer in a court of equity, passes the limits of our comprehension.

That the defence set up in this case was correctly and completely raised by demurrer, there can be no question. A party defendant may make his defence in equity in four modes, of which demurrer is one. A demurrer is applicable to any defence which can be made out from the allegations in the bill; and whenever the ground of objection or defence is apparent on the face of the bill itself, the proper mode of taking it is by demurrer (Ad. Eq. 333; St. Eq. Pl. sec. 453).

The following rules of equity will be found extremely pertinent to the present case. It is expressly laid down, that "if the equity depends on a title to property in the plaintiff, the statement must show *a sufficient title in point of law.* (Ad. Eq. 303). It is also laid down as a further vital rule of equity jurisprudence, that, "in all cases where the interference of a court of equity is sought, the plaintiff should not only clearly show his title, *and right to demand the assistance of the court in his favor*; but also that his case is one of which the court has jurisdiction, and *to which it ought to apply its remedial justice.* If this is not done, the suit is fatally defective, and the bill must fail." (St. Eq. Pl. s. 290).

Now, as a demurrer necessarily admits the truth of the facts stated in the bill, so far as they are relevant and well pleaded, (though not conclusions, or arguments, or inferences improperly introduced by the pleader), the defendant by his demurrer here admits (for the purposes

of the suit) not only the truth, but also the sufficiency and fulness of the plaintiffs' statement of facts. Whatever decree the chancery judge would have pronounced at the hearing, if the same facts were there proved or admitted, he was bound to pronounce upon the demurrer.

The defendant, then, undertakes to show that the demurrer was well founded, and that upon the plaintiff's own showing, taking their whole case as made by the bill upon the mortgage and the admitted facts together, their claim must be held fraudulent and void as against creditors of the mortgagors, such creditors being in this suit represented for all purposes by the defendant, the mortgagors' assignee in bankruptcy.

The particulars of the appellants' claim, as set forth in their bill, are as follows:

John T. and Seth A. Coolidge were partners in the retail dry goods trade in Evansville from 1863 to 1873. They carried on business in a rented store, and it may be taken as a fact that they had no other property than their stock of goods, furniture and fixtures, inasmuch as at the date of the bankruptcy the entire assets of the firm were composed of goods on hand and debts due to the firm. On July 7, 1871, they were indebted to the appellant, Mrs. Sloan, in the sum of $3,174 for money previously lent, (apparently without security),—to a bank, upon notes of different dates previous thereto, indorsed by the appellant Robinson, (for which liability he, too, apparently held no security), to the amount of $7,600,—and to Alfred Coolidge, their father, in $3,500; making in all $14,274. What amount of other debts they owed at this time is not stated; though it appears by the bill that such debts did, in point of fact, exist. On the above mentioned date, July 7, 1871, these traders executed to the appellants the mortgage which is set out with the bill, in which they in the first place recite their liability to the appellant Robinson on

the notes indorsed by him, seven in number, (for $7,600 in the whole), all drawn at three months from their respective dates, and all maturing between the 25th of July and 6th of October of the same year, and that "it is contemplated that in order to take up said several notes, or some of them, it may become necessary to renew the same, or discount other notes to enable the said mortgagors to take up said notes, or raise money therefor." They next recite the indebtedness to the appellant Mrs. Sloan of $3,174, evidenced by their note of that date to her, payable four months after date with 7 per cent. interest, and that "it is contemplated that if it is not convenient to pay the same, that it may be renewed from time to time as the parties may agree." They then "in consideration of the premises, and to secure, indemnify and keep the said Andrew L. Robinson harmless against all losses, damages, costs and expenses, which he may incur by reason of his having executed the said notes as surety to said parties of the first part, and on account of his hereafter signing, making, accepting, drawing or indorsing any notes, bills, drafts or other evidences of indebtedness in renewal of said notes, or to raise money to take up the same or any renewal thereof, and in order to secure the payment of said note to said Julia R. Sloan," affect to grant to the parties of the second part *their entire property*, that is to say, "all the goods, wares and merchandise, furniture and fixtures, now in the store of the parties of the first part, on Main street, Evansville, aforesaid," stated in the bill to be of the value of $18,000. Then immediately follows this extraordinary provision, which certainly merits the prominence of a separate paragraph:

"*And it is hereby expressly agreed, that until default shall be made in the payment of some one of said notes, or some paper in renewal thereof, the parties of the first part may remain in possession of said goods, wares and merchandise, and may sell the same as heretofore, and supply their*

places with other goods, and the goods substituted by purchase for those sold shall, upon being put into said store, or any other store in said city where the same may be put for sale by said parties of the first part, be subjected to the lien of this mortgage."

The instrument then concludes with separate powers to the mortgagees, upon any default in payment of their respective claims, to seize and sell sufficient goods to satisfy the same. But these powers, as we shall presently show, have such a vital bearing on the construction of the mortgage, that we feel constrained to give them *verbatim*. They read as follows:

"And it is hereby expressly agreed that upon the failure of the said parties of the first part to pay any one of said notes upon which said Robinson is liable, or any paper given in renewal thereof, or any note or other paper given to raise money to take up any one of said notes, or any one given in renewal thereof, at maturity, thereupon said Robinson *shall have the right* without let or hindrance *to enter into said store* of the parties of the first part *and take possession of a sufficient amount of goods* to satisfy, pay and discharge all the paper upon which he shall then be liable as surety for said parties of the first part, and shall have full power and authority, upon ten days' public notice, to sell at public auction such amounts of said goods as shall be necessary to pay said paper on which he shall be so liable as the same shall mature:

"It is hereby expressly stipulated that said Robinson shall have full power to seize and sell goods for the payment of notes which shall be due and unpaid in the first instance, without being required to take up the notes and then look to his principals for indemnity, and to seize and hold goods to secure the payment of all paper on which he may be liable, upon failure to pay any one note:

"And, in like manner, in case the parties of the first

part shall fail to pay said note to said Julia R. Sloan, or any renewal thereof, *then she may seize a sufficient amount to satisfy said note out of any goods on hand on which this mortgage operates*, and proceed after ten days' notice to sell the same at auction for the satisfaction of said note and all interest and expenses of sale."

The history of the appellants' claims is given in the bill more fully than in the recitals of the mortgage. We give it in the appellants' own words, as it, also, will prove an important feature in our case. After stating that the bankrupts had been in business for ten years previous to the bringing of the suit, the bill proceeds thus:

"That the said firm, desiring to borrow money of the First National Bank of said City, applied to your orator Andrew L. Robinson to become their accommodation indorser: and that, *from the year* 1865 *until the death of the said Seth A. Coolidge, he did indorse or become accommodation surety* upon the commercial paper of said firm, upon which they obtained loans of money from that time at different times as their convenience required. That on the 7th day of July, 1871, he was their accommodation surety to the said bank for the sum of $7,600."

Mrs. Sloan's claim is thus stated:

"That your oratress Julia R. Sloan *during the said ten years loaned to the said firm divers sums of money, for which she took their notes* bearing interest. The said loans in all amounted to the sum of $3,100. That on the said 7th day of July the said firm was indebted to your oratress on account of said loans in the sum of $3,174, for which they gave her their note of that date, payable four months after date."

The history of the taking of the mortgage is as follows:

"That on the 7th day of July, 1871, the said firm still being in business, and being indebted as above de-

scribed, your orator proposed that the said firm should give a mortgage upon the stock of goods *then in their store* No. 69 Main Street in said City, as well to indemnify your orator as their accommodation surety, as also to secure to your oratress the payment of the said debt of $3,174. That in accordance with said request the said firm *on that day* made and executed to your orator and oratress their mortgage of that date," a copy of which is made part of their bill.

The bill also shows that Alfred Coolidge's claim of $3,500 was made up of $1,000, money lent the bankrupts in 1856, and $2,500, money lent them on February 28th, 1871, for which he held their notes, the first payable in one day, the other in three months, after date.

All other debts owing by the bankrupts at the date of the mortgage are alleged to have been paid.

The mortgagors remained in unmolested possession of the said property, and bought, sold and traded at their pleasure from July 7, 1871 to August 7, 1873, when Seth A. Coolidge died. During this interval of twenty-five months, they paid the interest on the debt to Mrs. Sloan, and "a small portion" (viz. the sum of $82.30) of the principal. They also paid the interest on the bank debt, and $2,500 (rather less than one-third) of the principal. The bill shows that Mrs. Sloan's note was not renewed, but remained in default from its maturity in four months after its date until the death of Coolidge, a period of *twenty-one months*. The bill also shows that $2,500 of the paper on which Robinson was liable was on the 16th September, 1873, "some weeks" past due.

Immediately after the death of Seth A. Coolidge, the property of the firm was inventoried, when the assets were found to be (nominally) $17,581.13, and the debts $17,395.72. The estimate of assets was made up as follows: old stock, which had lain on hand since

July 7th, 1871, $11,234.80; goods subsequently purchased, $3,700.54; debts due the firm, $2,645.79. This appraisement was completed on Sept. 15th. Next day the appellants seized the goods and advertised them for sale; but proceedings in bankruptcy against the surviving partner having been commenced, the sale was prevented by injunction. On Oct. 4th, John T. Coolidge was adjudged bankrupt, and on November 15th, the defendant, having been duly appointed assignee, received an assignment of the bankrupt estate. Immediately thereafter he demanded the goods from the appellants, who refused to deliver them.

The bill concludes with a prayer that an account may be taken of the appellants' claims, and for a sale of the goods.

The foregoing is an accurate summary of the facts on the strength of which the appellants claim the assistance of the court. But the bill also contains so curious a piece of what we may term fancy pleading, that we must not omit to reproduce it. The appellants relate, for the edification of the court, that the ground on which the respondent claimed the goods was, that the mortgage was a fraud on the other creditors of the bankrupts; but assert, that they distinctly deny any such imputation, and that the mortgage "was given in the utmost good faith, and without the intention of defrauding any one, either those persons who at the date of said mortgage might be creditors of said firm, or those who afterwards might become such." From this it would seem that the appellants felt doubtful of their position in the outset, and so thought it advisable to endeavor to gain a march on the respondent by meeting the charge of fraud in advance. In doing so they do not seem to have remembered that, in the experience of men and of courts, a much clearer badge of fraud is not usually required than to find a party in haste to put forth a premature denial of such a charge. The 6th

point expressly resolved in *Twyne's Case* was, that "the deed contains that the gift was made honestly, truly, and *bona fide*: *et clausulæ inconsuet' semper inducunt suspicionem.*" In a pleading point of view, the allegation is wholly unavailing. It is not only irrelevant and redundant, but repugnant also (1 Dan. Ch. Pr. 566-7); inasmuch as the intent of the parties to this deed is a matter of construction or inference from its whole provisions. The law has no other means of judging of the intentions of parties than from their words and actions, and never forgets that every man is held to intend the necessary consequences of his own acts. Such an averment is in no sense a statement of fact, but is regarded in pleading as a mere fanciful pretence, and not in the bill for any purpose, except for the grave suspicion with which it affects the plaintiffs' case in the very statement of it.

The mortgage before us is certainly a remarkable one. We do not believe that the most experienced conveyancer ever met with such an instrument. Nothing approaching it is to be found in the reports. It is not alone its defiance of legal principle which strikes the mind of the reader: but also its easy indifference to the absence of each and all of those provisions which would seem to have been no more than a proper safeguard for a creditor to require, who honestly wished to secure the payment of his claim at the earliest opportunity consistent with a reasonable degree of leniency to his debtor.

If the terms *property* and *dominion*, as applied to the *objects* of property, are in fact synonymous; if the idea of property in a thing is measured by the degree of dominion which we can exercise over it; then it is difficult to perceive what present right, title or interest in the goods passed to or vested in the mortgagees on the execution of that mortgage. It is quite easy to understand how the property may pass, and yet a lim-

ited right of mere possession be accorded for a specified time to the mortgagor. Such a provision, in a mortgage otherwise *bona fide*, no one at the present day would think of impugning. But how different is the case here. Until default should be made in the indefinite future, the mortgagors were to retain the entire *jus disponendi* exactly as before. The possession remained with them. A disposing power, which they could without the assent of the mortgagees or any other determinate person exercise for their own benefit, remained with them. What more was necessary to make up the entire dominion? They could sell the goods, in the face of the mortgagees, to whomsoever they pleased, and the entire property therein would immediately pass to the purchaser. In the case of a mortgage merely permitting the retention of *possession* until default, then, upon an unauthorized sale, the mortgagees would have had their action of replevin or trover, and could have followed the property into the hands of the purchaser. Not so here: the purchaser's title was irrefragable; and so, we may add, was the mortgagors' title to the purchase money.

Blackstone says (2 Bl. Com. 15), "the objects of *dominion* or *property* are things, as contradistinguished from persons;" and he defines *jura rerum* to be "those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers on natural law style the rights of *dominion*, or *property*" (2 Bl. Com. 1).

If we draw an illustration from the principles of the contract of sale, we find that, if it is desired for any reason that the property in the thing sold should not pass to the buyer until some subsequent event happens, that object may be attained, in the case of the sale of a specific chattel, by a simple agreement to that effect. Or, in the case of an executory agreement for the sale of chattels not specific, and of a subsequent appropria-

tion of the chattels to the contract on the part of the vendor, still, no matter how definite and complete such appropriation may have been, the property will not pass if the acts of the vendor show clearly his intention to retain the ownership, notwithstanding such appropriation. This is termed "the reservation of the *jus disponendi.*"

Let us take the case of a mortgage of real estate, and imagine in such a mortgage a clause like this:

"And it is hereby expressly agreed, that until default shall be made in the performance of some one or more of the conditions of this mortgage, the said mortgagor may from time to time, as often as he shall think proper, sell the lands above described in whole or in part, and convey the same, when so sold, to the purchaser or purchasers thereof, absolutely freed and discharged from the operation of this mortgage: and the said mortgagor may receive and retain the purchase money upon all such sales, and his receipts shall be effectual discharges therefor, and no purchaser shall in any way be bound to inquire as to the application of the purchase money."

Would not such a clause excite a shout of derision? Yet, what possible difference can it make whether the subject of such a power be lands or goods? Is it less absurd and contradictory in one case than in the other?

Blackstone defines a grant of chattels personal to be "the act of transferring the right and the possession of them; whereby one man renounces, and another immediately acquires, all title and interest therein" (2 Bl. Com. 441). Now, a mortgage is a grant upon condition. The title is absolute in the grantee, subject to be defeated by the performance of the condition. It is not inconsistent with the principle stated, that the mortgagee, having by the grant acquired the title and the general property, should (by analogy to the re-demise in a mortgage of land) make a bailment of the possession

to the grantor for a limited time, until he either performs the condition or makes default in doing so. But in our case, by the very terms of the mortgage, while the mortgagors make a great affectation of granting, they neither renounce, nor do the mortgagees acquire, any present title or interest in the goods, which is repugnant to the very nature and definition of a grant. That instrument can never be a valid grant, which, at the time of its execution, contains not one of the constituent elements of a grant. For every instrument is to be construed with reference to its object, and the whole of its terms; and there is no magic in words of grant in one part of a deed, if in another part an express agreement is to be found which completely defeats their operation.

We are now looking at the matter from a purely conveyancing point of view. And we submit that we have demonstrated, by an examination of the first principles of the law of personal property, that in this case there never was any real grant,—that no legal title passed to the mortgagees,—for the reason that the mortgagors retained *both* the possession *and* the right of disposition. The retention of this right conclusively rebuts any presumption that under this deed any present interest, conditional or otherwise, ever passed or ever was intended to pass. In the case above put upon the contract of sale, the ownership is retained, and yet the expectation of the parties is that the thing sold will at some time become the property of the purchaser. But here the transaction is only a security: and it is quite easy to understand that, whatever the forms of expression used in any one part of the deed, the whole intention of the parties may have been, as we shall presently demonstrate that it was, never to pass any property, but merely to confer certain powers of seizure.

We conceive that this reasoning, founded as it is

on the clearest principles of the law, hardly requires us to go on our travels in search of authority to sustain it. But the leading case of *Collins* v. *Myers* (16 Ohio, 553), and the admirable opinion of Manning, J., in *Gay* v. *Bidwell* (7 Mich. at p. 526), are two out of many cases where the same doctrine will be found most ably stated and illustrated.

But then there are to be found in this deed two other most material provisions, which of their own force, (though still more convincingly when taken in connection with this unrestricted right of disposition and the absence of any proviso for redemption in the mortgage), completely exclude the notion of there being at that time any contract with regard to a present interest in any part of the property which is the subject of the deed. These are the distinct and elaborate powers which are separately given to the two mortgagees in the final clauses of the deed, in case of default in payment, to enter upon the premises and seize and sell sufficient amounts of the goods then on hand on which the mortgage may operate, for the satisfaction of their respective claims.

Let us once more advert to the nature of a legal mortgage. It is of the essence of a grant by way of mortgage that there should be a proviso for redemption. If default is made, the condition is gone, and the property remains absolute in the mortgagee. Every well-drawn mortgage of goods therefore contains (exclusive of recitals) the following integral parts. 1. A grant. 2. A proviso for redemption. 3. A covenant for payment. 4. (Usually) a stipulation permitting the mortgagee to retain possession until default. 5. A power to the mortgagee to enter immediately upon default and seize and carry away the goods mortgaged. 6. A covenant that after default the mortgagee may hold and enjoy the goods absolutely, without let, suit or hindrance by the mortgagor or any one claiming under

him. But the deed before us has no proviso for redemption, and its operative part contains but three provisions, viz: a nominal grant, an express right of disposition reserved to the grantors, and limited powers of seizure and sale by the grantees in case of default. These last named authorities are wholly at variance with the idea that there was a present contract that the mortgagees should have a right and an interest attaching immediately by force of the contract. Under an ordinary mortgage everything was (at common law) upon condition broken absolutely gone out of the mortgagor and vested in the mortgagee. The title, the right of possession, the right of entry to take possession, were all in the mortgagee. Of what use, then, was a power to him to seize and sell "sufficient" of the goods which had already become his own? Or how could the mortgagor confer upon him any such right? But that is the sole power given to the mortgagees here, and that not jointly, but severally, completely controlling any operation the deed might otherwise have had, and tending to complications of the most difficult character..

Again, although this deed purports to grant to the two mortgagees jointly the entire stock of goods, a default in payment towards one is made to work no forfeiture as regards the other. In truth, it works no forfeiture towards either. Each mortgagee is merely separately empowered, upon a default affecting him or her alone, to seize and sell "sufficient" goods (no more) to satisfy that one individual claim. Subject to the exercise of this power by the particular mortgagee whose claim is due, the mortgagors retain the right to go on as before. Thus, upon one of the notes indorsed by Robinson becoming in arrear, he is enabled to seize and sell sufficient goods to satisfy his whole liability. But, although he should thereby completely break up the mortgagors' business, Mrs. Sloan would have no

right, either of participation in the benefits of that seizure, or of an independent seizure on her own account, until the time for payment of her debt had fully expired. A consideration of the conflicting rights of the mortgagees under these separate powers is quite sufficient to extinguish any lingering idea that this deed has any pretensions to the character or effect of a valid mortgage.

It will be observed, moreover, that these two classes of provisions, viz: the disposition secured to the mortgagors until default,—after default, a right in the mortgagees to seize and sell sufficient goods to satisfy their demands,—while totally irreconcilable with the legal idea of a grant of any present interest, are perfectly consistent with each other.

Further, the circumstance that this deed was made and executed with reference to a constantly shifting stock of goods, the attempt to subject future acquisitions to its operation, and the peculiar but significant expression in the power of Mrs. Sloan to seize "any goods on hand on which this mortgage operates," are all important features to be attended to in the construction of this unique security. They all tend irresistibly to the conclusion that the security was intended to be in reality a mere power, wholly future in its character, and uniform in its operation on present and after acquired goods.

It has been very well said by a learned writer that "the essence of a contract is the right vested in one party, and the obligation incurred by the other" (1 Powell on Contracts, 248). Applying then to this deed the golden rule for the construction of all contracts, that the intention is to be collected from the whole instrument taken together, what right do we here find vested in these mortgagees? Have they any present interest in any goeds whatever, — any certain lien on any one article out of the whole $18,000 stock? Does

the mortgage (at law) become absolute on default, and the property remain absolutely vested in them as joint owners, subject indeed to the power of the mortgagors to claim the right of redemption in a court of equity? Nothing of the kind. The entire agreement, from beginning to end, resolves itself into absolutely nothing more than separate, independent and adverse powers to the two mortgagees, upon separate defaults, to engage in a sort of scramble for the property, wherein the first to seize shall be free to take and sell sufficient to satisfy his or her individual claim, without any reference to, and, if necessary, to the entire exclusion of, the other. So that, in case the goods were only sufficient to answer one claim, the first comer would take the whole.

A decisive test that the rights of the mortgagees under this deed were no other than a mere power or license to seize may easily be supplied. Suppose the mortgagors had attempted to revoke these powers of seizure, and had refused to allow the mortgagees, after default, to take possession of any goods whatever. In what position did the mortgagees stand in such a case? In what portion of the stock had either of them such an interest as would have enabled him or her to maintain replevin therefor? They had each the right, "first come, first served," to help themselves out of the blended mass, so long as the mortgagors were willing that they should do so. But if the exercise of this right had been denied them, it would be absurd to pretend that either of them had then an action of replevin for an undefined slice of the stock. This result would have been the same had the security been made to a single mortgagee. But, in this case, suppose both claims had been overdue: how could Robinson, for instance, have had a legal right to any particular portion of the stock, when such right as the deed gave him would have been gone if Mrs. Sloan had stepped in before him?

It is not our fault that the attempted working out of these powers might have caused such hopeless embarrassment to the mortgagees. They chose to discard the ordinary power, such as plain and simple folks use, to take possession of the whole stock immediately on default, and to substitute these novel and perplexing provisions. Such as they are, they must govern the construction of the deed, and be allowed their full effect in determining the intention of the parties. *Expressio unius est exclusio alterius.*

We are now discussing the extent and operation of this deed between the original parties. *But, that it should ever have been attempted to make such an agreement, so unusual in its provisions, so incongruous in its operation, assume the apparent form of a present valid and effectual grant,* is one of the many reasons we shall hereafter submit in support of the conclusion that this instrument was concocted and perfected in furtherance of a preconceived design of the most fraudulent character.

The task of construction of an instrument is twofold. First, to get at the intention of the parties; and secondly, the intention having been discovered, to subject the instrument, in its operation, to the established rules of law (Gr. Ev. s. 277). A careful consideration of the whole of this deed has shown the intention to be too clear for serious argument. The Coolidges never intended to part with the control or disposition of their stock, but, at best, merely to grant a security *sub modo.* What then was the legal effect and operation of this instrument? Nothing more, either at law or in equity, than a mere separate license to each of the mortgagees, at some future time, if default should happen, to enter upon the premises and seize such goods as they might then find there; it being left to the honor of the mortgagors whether any goods should then be there or not, as well as whether they would then permit the ex-

ercise of the license or not. From this reasoning it follows that, whenever the future event happened which was to give the mortgagees the right of seizure, the mortgage conferred upon them (as between themselves and creditors of the mortgagors) no other or greater right against any balance of the original stock of goods which might be then on the premises, than against any subsequently acquired goods which might be there at the same time. Such right was a mere license to seize such goods as might be on the premises at the time of the coming into existence of the right, quite irrespective of the time of acquisition of the property by the mortgagors. The legal consequence of all this is, that the goods never were protected from execution, and might, at any time before seizure at all events, have been levied upon by an execution creditor. "A power is very different from an interest; and if the extent and limit of a contract be merely that the mortgagee shall have such a power, *then an interest will not arise under the power till the power is exercised*" (*Reeve* v. *Whitmore*, 4 De G. J. & S., at p. 18). As against an assignee in bankruptcy, such a power would clearly not relate back to the execution of the mortgage, but would be regarded as being constantly carried forward, and only speaking from the moment of the seizure. Such seizure, so made by the license and consent of the debtor, would be regarded as a voluntary transfer by the debtor to his creditor as of that date, and consequently, if made within two months before the filing of the petition (which is the case here), would of course be void as a preference prohibited by the bankrupt law.

If the rule were otherwise than as here stated, then a secret deed containing nothing but a simple power of seizure, (which, being in no sense an assignment, would not be within the recording clause of the chattel mortgage act), would, if executed a sufficiently long time before the debtor's bankruptcy, escape the operation of

the fraudulent preference clauses of the bankrupt law, and enable dishonest debtors and creditors to perpetrate the most startling frauds with impunity.

The last feature to be noticed in this deed is its futile attempt (or rather pretence) at subjecting future purchases to its lien. Probably no portion of the instrument displays its frivolous character in a clearer light than this. We do not now propose to enter upon the general question of the creation of a lien on after acquired property, but simply to show that this deed created none.

The doctrines of both law and equity as to the assignability of after acquired property have been long since settled, and rest upon principles of the most simple and elementary character: yet no branch of the law has been more wonderfully misunderstood. At law, an assignment of a thing which has no existence, actual or potential, at the date of the deed, is altogether void. "It is," says Perkins, "a common learning in the law, that a man cannot grant or charge that which he hath not" (Perkins, tit. "Grant," s. 65). Further, the phrase here used, "shall be subjected to the lien," would in any case be inadequate to create any legal interest even in regard to existing goods (St. Eq. Jur. s. 790). Equally clear is it that the contract in the present case to subject future property to the lien of this mortgage could confer no right in equity, for the simple reason (the only one we intend to discuss here) that it is not such a contract as a court of equity would decree to be specifically performed. It is useless to contend that the beneficial interest in property, real or personal, would, under any circumstances, be transferred any more effectually in equity than at law, where the supposed contract is not one of that class of which a court of equity would decree specific performance. Now, it is perfectly clear that a court of equity will not, as a general rule, decree specific performance of

a contract for the sale of personal goods (St. Eq. Jur. s. 717, 746); it will not decree specific performance of an agreement for the sale of goods which relates to no goods in particular (10 H. of L. C. p. 209); still less an agreement to charge or mortgage every addition, large or small, which may from time to time be made to a stock of goods in a store, where quantities are being daily sold out of the whole mass. Such an agreement as last stated would, in its very nature, be perfectly incapable of specific execution. The principle is clearly stated in the luminous judgment of Lord Chancellor Westbury in the case of *Holroyd* v. *Marshall* (10 H. of L. Cases, at p. 212), where he says, "I have already explained, that a contract relating to goods, but not to any specific goods, would not be the subject of a decree for specific performance, and that *a contract that could not be specifically performed would not avail to transfer any estate or interest.*"

The grounds of this last rule are sufficiently obvious. It is only by making use of a metaphysical notion that the property in a thing can ever be said to pass in equity by the mere force of a contract. The property does not in any case actually pass in equity if it does not pass at law. But if the contract be fit and proper to be specifically performed, equity regards the vendor as a trustee for the purchaser from the date of the contract, and treats him as such in decreeing specific performance. But this assumption of power over the conscience of a party by a court of equity is only ancillary to the decree for specific performance. The propriety of decreeing specific performance is the first question, and then the holding the vendor a trustee of the property for the purchaser upon the terms of the contract follows as an incident. It results, therefore, that where, from the terms of the contract, or the nature of the subject matter, or for any other reason, equity regards the case as not one for specific perform-

ance, that is tantamount to declining to interfere *in toto*, and the parties on both sides are left to their original positions at law. This principle is repeated four times over in the judgment of the Lord Chancellor in the celebrated case cited above. But, though of the greatest importance, it is constantly being lost sight of.

But further, a court of equity will not make a decree that would be vain and nugatory: and therefore will not direct anything to be done that must be useless. Now, by the express terms of this mortgage, not only have the mortgagors the right to continue to sell the original stock of goods as before, but the lien on the new goods is declared to attach on their being put into any store "where the same may be put for sale:" showing that the right of sale and re-sale was to continue *ad infinitum* as long as the mortgage itself endured. If, then, one essential criterion for determining whether, in a given case, a contract relating even to existing property stands on any better footing in equity than at law, is invariably this, to consider whether the contract be such as a court of equity would decree to be specifically performed, what court of equity in the world would entertain for a moment a bill against a party for specific performance of an agreement to sell or mortgage goods, by which it was provided that that party should still practically remain the owner of the goods? Or attempt to enforce a lien against goods in the hands of a party who, by the express terms of the agreement, beyond which of course no decree could go, had the right to dispose of those very goods as fast as they came into his hands? Nugatory and self stultifying agreements of this kind have not hitherto been the subject of the equitable interposition of the court of chancery.

But the utter unreality of the transaction is not more striking in a legal than in a commercial point of view. We might naturally have expected to find a well-

meaning creditor, in taking a *bona fide* security, insisting upon some provisions of this sort: that a short date should be fixed for the complete payment and extinction of the mortgage debt:—that the goods meanwhile should be sufficiently insured, and the policy assigned to the mortgagee:—that if it were intended that the fund for payment of the debt should arise from sale of the goods, then that the goods should only be sold in the strict and regular course of retail business, and should not otherwise be removed from the store in which the mortgagor was doing business:—that the mortgagor should sell only as agent for the mortgagee, and not otherwise:—that the moneys received should be the moneys of the mortgagee, and the mortgagor his agent in handling them:—that these moneys should be kept separate from all other moneys coming into the hands of the mortgagor, and should be regularly paid over to the mortgagee at short intervals:—that strict accounts should be kept, and regularly furnished to the mortgagee:—that if new goods were required to replenish the stock, the same should be purchased in the name and for account of the mortgagee, and only by his direction:—that the mortgagee should at all times have the right to enter and view the stock and satisfy himself of the mode in which the business was going on:—and that on breach of any of these conditions the mortgagee might at once take possession.

Stipulations of this character would have tended to impress us with the idea that the intentions of the parties were *bona fide*. But what do we find here? No provision for the rapid extinction of the debt, but a deliberate declaration that if it was "not convenient" to pay the debt, it might be renewed from time to time as the parties (good easy people) might agree:—no insurance, though all important in a *bona fide* security of perishable property:—no provision (always found in chattel mortgages) that the stock should not be re-

moved from the store, or the city, or the county, or even the whole state:—no provision that the goods should only be sold in the ordinary course of retail trade (they might all have been disposed of the next week):—no provision that the mortgagors should be considered in any way agents for the mortgagees:—no accounts, either of sales to be made or moneys to be received:—no right of entry or supervision:—no power to the mortgagees to seize in case of misconduct, however gross, except upon the single event of default in the mere payment of the debt.

Such is the security in behalf of which the appellants have entered the doors of a court where they are met at the threshold by that emphatic maxim of equity, "*A party must come into court with clean hands.*" We have examined the instrument thus at length in order to show that, as a *mortgage* security, it was unreal in point of fact, invalid in point of law. We now propose to go further, and to show that it was fraudulent in its terms, fraudulent in its consequences, fraudulent in the light of the antecedent and subsequent dealings: that while it never afforded any real security to the mortgagees, it was in the highest degree calculated to hinder, delay and defraud the other creditors of the mortgagors.

This is an easy task, upon the general law. But the appellants tenaciously cling to the statute of Indiana, and, while contending that the 20th section revolutionized the mode, argue that the 10th section supplied a new principle, upon which this case should have been decided. They seem to have got the idea firmly into their heads that chattel mortgages, so far as the State of Indiana is concerned, were born of this statute. And they further seem to think that registration is a panacea for every vice, or infirmity, or other defect which the mortgage may be inherently affected with; in short, that it is immaterial how fraudulent every line

of a mortgage may be, so long as it is recorded in compliance with the Act. A short view of the law historically will dispel this second illusion as effectually as the first.

In *Heydon's Case* (3 Rep. 7 *b*), Lord Coke says that it was resolved, "that for the sure and true interpretation of all statutes in general, (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered. 1st. What was the common law before the making of the Act? 2nd. What was the mischief and defect for which the common law did not provide? 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? And, 4th. The true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy."

The statement in the appellants' brief, that chattel mortgages were unknown at common law, is in the highest degree inaccurate. In rude and early days of English society, when even the nobles were seldom able to write, and lands were usually conveyed by a mere parol feoffment or gift accompanied by livery of seisin or the actual possession, mortgages of personal goods were probably usually effected by actual delivery of the thing mortgaged to be held as a pledge. But to say that, after society had advanced, chattel mortgages unattended with possession have not for several centuries been recognized at common law, shows very little acquaintance with either the history of the common law or the very reason which led to the passing, in England and the different States of America, of acts such as that before us. In Bullier's *Nisi Prius*, written a century ago, it is laid down at page 258, "But yet the donor continuing in possession is not in all cases a mark of fraud: as, where a donee lends his donor money to buy

goods ,and at the same time takes a bill of sale of them for securing the money."

In the very leading case of *Edwards* v. *Harben* (2. T. R. 587, decided in 1788), the Court in giving judgment say, "So long ago as the case in Bulstrode (*Stone* v. *Grubham*, 2 Buls. 226, decided about 1620), the Court held that an *absolute* conveyance or gift of a lease for years, unattended with possession, was fraudulent; but if the deed or conveyance be *conditional*, then the vendor's continuing in possession does not avoid it, because by the terms of the conveyance the vendee is not to have the possession till he has performed the condition. Now, here the bill of sale was on the face of it absolute, and to take place immediately, and the possession was not delivered; and that case makes the distinction between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time. For in the latter case the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed: and such possession comes within the rule, as *accompanying and following* the deed."

In Williams on Personal Property, a work of the highest authority, it is stated at p. 48, "But if the assignment be made to secure the payment of money at a future day, with a proviso that the debtor shall remain in possession of the goods until he shall make default in payment, the possession of the debtor being then consistent with the terms of the deed, is not regarded in modern times as rendering the transaction fraudulent within the meaning of the statute." He then goes on to refer to the English acts requiring such bills of sale to be recorded, the first of which was passed in the year 1854, and says, "Such bills of sale before the act were valid as against an execution creditor, though void as against assignees under the bankruptcy of the grantor; and the act does not appear to give to

such bills of sale as are filed under it any greater validity than they had before. But if the bill of sale be not filed, the goods may now be taken in execution, which they could not have been before the act."

Another English writer is equally explicit. In May on Fraudulent Conveyances, p. 120, it is said, "Of course the mere fact of due registration of a bill of sale under this act does not necessarily make it good against creditors. The act was not passed with a view of making good a title which would not have been good before, but simply for the protection of creditors." And on p. 122 of the same work, the act is described as "An Act which simply invalidates bills of sale unless filed."

That this is the plain, common sense explanation of the passage of these acts, is shown by many American authorities of the highest weight. We select a single one. In *Wood* v. *Lowry* (17 Wend. at p. 495–6), the court say, the chattel mortgage act "cannot aid the plaintiffs. This does not repeal the statute concerning fraudulent conveyances. It only adds another to the grounds on which a mortgage of personal chattels shall be void. If the plaintiffs had omitted to file their mortgage, it would for that cause have been absolutely 'void.' If it was before void on another ground, *filing* could not make it valid."

The whole history of chattel mortgages may be summed up in a very few words. Assuming that in early times a chattel mortgage without the possession would have been fraudulent, the result of the authorities for at least 300 years past established this, that where, in strict pursuance of an honest provision to that effect contained in the mortgage, there was no actual possession given, such want of possession was not *per se* any evidence of fraud. Then came the chattel mortgage acts, which simply engrafted on the common law, as now understood, the necessity of registration. Such registration left the deed to stand upon its own

strength just as before. It was never intended that mere registration should supply all the effectiveness and convincingness arising from actual delivery of possession to the grantee, but that "it should give publicity to the mortgages, and rebut to some extent the inference of ownership of chattels deducible from visible possession" by the mortgagor. (May, 117—118).

We submit that the notion, that registration was ever intended by the legislature as a *substitute for possession* by the mortgagee, is wholly erroneous. Registration was *not* intended as a substitute for such possession, but to counterbalance the notoriety arising from possession by the mortgagor, which we apprehend is a very different thing.

This being the history of the common law on this subject, and these the reasons which have led to the passing of the chattel mortgage acts in other States where the common law prevails, it requires no great stretch of the imagination to infer, when we find in a state using the same common law a statute almost precisely similar in its purport, that similar reasons must have led to its enactment.

The basis of the common law of Indiana applicable to the subject of chattel mortgages and fraudulent conveyances is the common law of England, as declared and strengthened by the 13 Eliz. c. 5. The statute law of Indiana on the same subject is embodied in the statute cited by the appellants.

By express enactment in Indiana, the common law of England, and the general statutes of that kingdom made in aid thereof prior to the fourth year of James I, (with three exceptions, one relating to costs and two to usury), were declared to be the rule of decision in this State. "This adoption of the English common law has been repeated at every revision of our statutes since 1807; and these laws are now in force here so far as they are consistent with our own legislative acts."

(*Stevenson* v. *Cloud*, 5 Blackf. 92: 1 Gavin & Horde's Rev. Stat. p. 415: 1 Ind. Rev. Stat. 1852, p. 351).

The statute of Elizabeth is therefore in full force in Indiana, independently of its substantial re-enactment in some of the other clauses of the local statute above mentioned; and it has repeatedly been judicially declared to be so. (1858, *Jones* v. *Gott*, 10 Ind. at p. 242). And Story (Eq. Jur. s. 353), speaking generally of this statute, says, "the statute of 13 Eliz. c. 5 as to creditors has been universally adopted in America, as the basis of our jurisprudence on the same subject."

Let us recur again to the chattel mortgage registration clause of the Indiana act. The words are, "No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, when such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage" shall be duly recorded under this act. This enactment is a purely statutory requirement. The common law made no provision for registration. Now, it is a settled doctrine with regard to statutes which engraft new regulations upon the common law, that it is against principle and authority to infringe upon the common law any further than is necessary to afford the full measure of relief or benefit the statute was intended to give. Would it not then be a strange effect to give to a statute passed undeniably for the relief and protection of creditors, to hold that the simple wording, "no mortgage shall be valid unless recorded," should operate to set up as valid and unimpeachable every fraudulent device which, under the name of a mortgage, might be registered in accordance with the statute? Yet the argument for the appellants, if it has any meaning, goes this length. As Martin, B. said in *Darvill* v. *Terry* (6 H. & N. 812), if the act is only duly complied with, "the most fraudulent deed will be well registered."

We are told in *Twyne's Case*, that it was resolved by the whole court, that "all statutes made against fraud shall be liberally and beneficially expounded to suppress the fraud." But, so far as chattel mortgages are concerned, the appellants' doctrine as to the effect of registration would blot the word fraud from our law.

We feel, however, that we have already devoted too much time to showing that the 10th section of the Indiana statute has no more bearing on the determination of this case than the 21st section formerly discussed. The decisions of the supreme court of the State, which we shall presently cite, will abundantly show how unfounded and absurd is the contention that there is anything in this section of the statute to prevent this case from being disposed of upon the broad principles of the general law.

Now, if such an instrument as that before us derived any such support from the decisions of the supreme court of Indiana as the appellants would fain have this court believe, we should certainly invoke the rule that, in questions of a commercial and general nature, the federal courts are not bound by the decisions of the state courts (1 Brightly's Federal Digest, p. 813, pl. 72 and 73). We should also show the inaccuracy of the appellants' notion that the question in controversy is one of property, in the sense in which the word property is used by courts in this connection; and that by the term property, when thus used, is meant real property only (ibid, p. 812, pl. 56). We should further point out, that while the federal courts adopt the decisions of the highest state courts as the local law of real property, they are not otherwise bound by the decisions of the courts of the States, except upon questions of local statute law (ibid, pl. 57): neither are they bound by the decisions of a state court upon a question of equity law (ibid, pl. 71): nor by the decision of a state court attempting to construe a deed by

the rules of the common law (ibid, pl. 69). But, as we understand the decisions, the supreme courts of the Union and of the state of Indiana have ever been in entire harmony on this subject; and the learned American editors of Smith's Leading Cases expressly so state in their note to *Twyne's Case* (1 Sm. L. C. 7th Am. ed. p. 52, 62). And we conceive that the doctrines and principles which have been so often and so ably defined in these courts are also undoubted law in England.

Where then shall we find, in the common law of England, in the doctrines of the Supreme Court of the United States, or in the common or statute law of Indiana, any warrant or authority, or any vestige or shadow of warrant or authority, to countenance the proposition that the grantor in a chattel mortgage may, in addition to the slowly and cautiously conceded right of retaining the mere possession until default, even under an honest provision in the deed to that effect, retain also the dominion and power of sale and disposition, which, in the case of personal goods, is identical with the property in them?

None, anywhere. In all the decisions of the courts of the country from which we have derived our language and our laws; in all the decisions of this high court of last resort for the people of this magnificent Union; in all the decisions of the State in which the transaction now under consideration had its birth, we do not find one case or even *dictum* to any other effect than that such an agreement, in the deed or out of it, renders the whole transaction (as against those persons who thereby "are, shall or might be in anywise disturbed, hindered, delayed or defrauded") "clearly and utterly void, frustrate and of none effect."

But, on the other hand, as we shall immediately show, the reports teem with cases in which the utter invalidity of a transaction even savoring of such an agreement, has been conclusively shown by courts of

the highest authority, in the strongest language and upon the most lucid principles.

We proceed first to cite the Indiana authorities, as perhaps the most singular of all the singular features of the appellants' brief is the way in which they have misapprehended or overlooked the decisions of their own state on this question.

In the leading case of *Jordan* v. *Turner* (3 Blackf. at p. 313), the court approvingly say, "In the cases of *Harris* v. *Sumner*, 2 Pick. 129, and *Murray* v. *Riggs*, 15 Johns. Rep. 571, it is decided that if a creditor takes a conveyance from his debtor of personal goods, to secure the payment of his debt, this being his only motive, but at the same time for the benefit of his debtor inserts provisions that delay, hinder or defraud other creditors, the conveyance is bad."

The judgment of Perkins, J., in the case of *Jenners* v. *Doe* (9 Ind. 461), adopted by the supreme court as a correct statement of the law in a case decided two years later (*Ewing* v. *Gray*, 12 Ind. at p. 70), is a conclusive as well as a thoroughly sound exposition of the effect of the Indiana statute. The first question in that case was upon the validity of a trust deed of lands for the benefit of creditors, which allowed the trustee 18 months before selling the property, and the privilege of then selling on five years credit. The other provisions of the deed were very judicious and proper. The court below held the deed void on account of the delay of which the deed admitted in the realization of the property. With respect to the statute, the learned judge says:

"The court held the deed void upon its face, as a question of law. It is contended that the court could not thus decide upon the character of an assignment—that it should, in all cases, refer the instrument to the jury, in connection with the facts.

"Our statute enacts that every assignment, &c.,

made with intent to hinder, delay or defraud creditors, shall be void; and further provides, that the question of fraudulent intent shall be a question for the jury. 1 R. S. pp. 302, 303, ss. 17, 21. *These provisions have declared, not changed, the law as heretofore expounded by the courts of this State.*

"When a written instrument is offered in evidence, it is first submitted to the court. The court decides upon its legal effect. That point being determined, it then goes to the jury, or is rejected, according to the decision upon its legal effect. For example, an assignment to a trustee, as in the present instance. It is first submitted to the court, and if the court determines that the legal effect of the instrument is to delay creditors, the instrument is rejected. There is no occasion to go into the question of intent; for that could not aid a void instrument. Intent will not control the plain legal effect of the terms of an instrument; and if that effect would be to delay creditors, any intent that the party might have had to the contrary would not help the matter. Suppose an assignment provided that the assignee should hold the property, and use, or permit the assignee, as his agent, to use, trade upon, and improve it, for ten years, in order so to increase its value that it would pay all the assignor's debts; and that the assignee should then sell it on credit for the best possible price, pay the debts, and return the overplus to the assignor; or suppose the terms of the instrument should be, that fifty cents on the dollar should, at the end of ten years, be paid to the creditors, and the property then be returned, so far as it remained unsold, in specie, to the assignor; would an intent of the assignor, however stoutly asserted and proved, change the legal effect of such an instrument so that it would not operate to hinder, &c., creditors? Would it not, in express terms, violate the statute? Most certainly it would." He then goes on to say that, "if the court finds the le-

gal effect of the instrument upon its face to conform to the law," all questions "showing a fraudulent intent in opposition to the fair legal effect of the instrument, are for the jury." "This is the plain reading of the statute. It does not thus refer the question of intent to delay, &c., as the legal effect of the instrument will disclose that to the court; but the intent to defraud alone."

Upon the general question the remarks of the learned judge are as follows: "The question now arises whether the legal effect of the instrument in this case is to unlawfully delay creditors; for some delay is necessarily incident to the carrying out of every assignment, and such delay is not embraced by the statute. This is aimed at a delay growing out of the terms of the instrument itself, and forming a part of its design and object; and we think the assignment in question clearly falls within it. The assignment gives the trustee a year and a half before selling the property, and the privilege of then selling on five years time—thus postponing creditors six years and a half, besides the additional delay that might be incident to collecting the sale notes, those of them the makers of which might happen to be solvent at the expiration of so long a period. If such an assignment does not illegally delay creditors, one postponing them sixty years could not be held to do so."

But the most important case on this subject in the Indiana reports is *The New Albany Insurance Company* v. *Wilcoxson* (21 Ind. 355). We are not favored with any reference to this authority in the appellants' brief. The judgment of the court in this case covers, in concise but explicit language, the very point on which the appellants so confidently invoke the aid of the Indiana decisions. At p. 358–9, the court there say:

"It is manifest, that if a mortgage is executed merely as a cloak to protect property in the hands of a mortgagor from creditors other than the mortgagee,

the mortgagor still retaining possession and the right of disposition, and these facts appearing upon the face of the instrument, they would, as a legal proposition, vitiate it; and a court should so declare. If these facts exist, but are not thus apparent, the effect which ought to be given to them would be the same, when they are brought to light. This, we think, can be done by parol evidence. Proof of acts of the parties to the mortgage, in reference to said property, might be shown for that purpose—such as the disposition thereof by the mortgagor, and application of the proceeds to purposes other than the payment of the secured debt, with the knowledge of the mortgagee. *Freeman* v. *Rawson*, 5 Ohio St. R. 1, and authorities there cited.

"If the mortgage should be made in good faith, and to cover a *bona fide* debt, still, if that, and the acts of the parties under it, are of the character above indicated, we can not see that their original good faith would divest the proceeding of its present legal effect to hinder and delay creditors."

This case was decided so lately as 1863. It is important, not only for the decision itself, but also in that it adopts and affirms in Indiana the standard modern case of *Freeman* v. *Rawson*, decided by the supreme court of Ohio in 1855.

In view of these pointed and consistent adjudications, we can hardly share the regret of the appellants that the questions they raise have not been more fully and completely determined by our own supreme court, nor are we likely to agree with them in the assertion that the rulings which have been made are all in their favor. The solitary case of *Maple* v. *Burnside* (22 Ind. 139), which they tell us "decides the precise point under consideration," does not even touch the question. The facts of that case are incorrectly stated by the appellants in the most material particular. From not one syllable of the report of that case, from its beginning

to its end, can it be gathered that the mortgage there contained any provision "permitting the mortgagee to remain in possession of the goods *and deal with them as his own*," nor does the judgment of the court involve any such question. It would indeed be singular if we found the supreme court ignoring the unbroken line of decisions we have cited, and refusing to repeat their explicit declaration (by the mouth of the very same judge) in *Wilcoxson* v. *The New Albany Insurance Company*, decided just six months before, that such a provision would render the mortgage void upon its face. In *Maple* v. *Burnside*, the action in the court below was brought by Burnside and another against Maple for a debt. As an auxiliary proceeding, an attachment was issued. The causes alleged in the affidavit for attachment were that Maple "had sold, conveyed and disposed of his property subject to execution, with the fraudulent intent to cheat, hinder and delay his creditors." Upon a denial of these causes arose the issue in that action, in support of which the plaintiffs, upon the trial (before a jury), gave evidence respecting a mortgage from Maple to Fletcher and Cullum, and contended that, upon the facts and circumstances they proved, it was fraudulent. There appears to have been no provision enabling the mortgagor to deal with the goods as his own, but simply the usual clause permitting the mortgagee to retain possession till default: for on p. 143 the court say "the right to retain said possession was to remain in the mortgagor until the maturity and failure to pay said debts. The question of the rights of the mortgagee in said property, while thus in his possession, is discussed at length. We shall not follow learned counsel in that discussion, having come to the conclusion, *in view of the evidence*, that the instruction was calculated to mislead the jury," etc. There is not a word here to show that the deed reserved to the mortgagor any other right than simple possession until

default, and the whole context implies the contrary. So does the charge complained of, upon which the case was reversed. The jury had been told that, "if, after the mortgage was given, the defendant remained in possession of the property mortgaged, *after the time named in it*, using and trading with the property as the owner, it is a fraud, and you must find for the plaintiff." This excludes the idea of a provision for that purpose appearing on the face of the deed: if it had, surely the judge would have expressed his opinion upon the legal effect of the instrument in very different language. But this instruction is altogether future in its terms. He refers to two distinct periods of time: one, the date of the deed; the other, "the time named in it," which, we should think, pointed sufficiently to the time limited for payment. This instruction was considered by the supreme court as open to a double exception. First, that the instruction tended to confuse the jury as to the time at which the right of possession ceased in the defendant. Secondly, that the mortgage (as we take it) not being impeached for any defect upon its face, but upon proof of extrinsic facts subsequently arising, the fraud deducible from these facts was a question for the jury, and was improperly withdrawn from them. The judge had not contented himself with telling the jury that the evidence might justify them in finding the transaction fraudulent, but merely left the existence of the facts to them, and took the inference arising therefrom entirely into his own hands. The reversal of the case on this ground was clearly in accordance with principle and long-settled law. With all deference to the supreme court, we hardly think the first exception a ground for reversing the judgment. Though the charge might have been more lucidly worded, still, in view of the discussion of the point which must have taken place in the course of the trial, the jury could scarcely have failed to understand that the point of time

to which the judge was directing their attention, as that after which the conduct of the parties became fraudulent, was the time named for payment. It will be observed that no expression of opinion escaped the supreme court that the jury would not have been well warranted in coming to the conclusion which the judge improperly assumed the right to draw. This case, therefore, is only an authority on a simple point of *nisi prius* practice.

We have not been able to find any reported case in which the opinion of this court has been invited on a question like the present. Parties probably felt that so long as the leading case of *Hamilton* v. *Russell* (1 Cranch 309) continued to furnish the guiding principles for the decisions of the court, cases of the present description would be appealed in vain. The case of *Fowler* v. *Merrill* (11 How. 375), cited by the appellants, has no bearing on the present question. Not only did that case arise on an entirely different state of facts, but the decision turned upon a mere question of notice, the court expressly declining to decide any of the other points raised.

In the other federal courts the point has arisen in several modern cases, but always with disastrous results to the party attempting to set up the transaction.

In *Bowen* v. *Clark*, decided in the U. S. District Court for Wisconsin in 1856, (reported in 5 Amer. Law Reg. 205), Miller, J. says: "By the statute law of this state, a mortgage of personal property is not valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be filed in the office of the town clerk. This mortgage was so filed. But this is a mortgage of a retail store,—the mortgagors continuing in possession, treating the property as their own, and retailing from day to day. By every sale and fresh supply the mort-

gaged goods changed their identity. I have no doubt that such mortgages are fraudulent as to creditors, and are void as against executions and attachments. Whether the power of disposition exists on the face of the mortgage, or is so understood or agreed between the parties at the time the mortgage is executed, or is freely to be inferred from its provisions, it is equally void, although it may be filed with the clerk according to the statute. It is to be considered and treated as a means of hindering or delaying creditors," citing *Griswold* v. *Sheldon*, 4 N. Y. 580: *Freeman* v. *Rawson*, 5 Ohio St. 1: *Jordan* v. *Turner*, 3 Blackf. 309. It will be observed that the words of the act quoted are almost *verbatim* those of the Indiana statute.

In the well-considered case of *In re Kahley*, (1870, 2 Bissell 383), Hopkins, J. declares that the retention of the *jus disponendi* will in all cases invalidate a so-called mortgage. That learned judge says:

"The mortgage was upon a stock that was kept for sale, and unquestionably both parties expected that it would be sold. The mortgagors were engaged in selling that class of goods as a business. They bought them to sell, and intended and expected to sell them. So that I must presume that it was understood and expected by both parties that the mortgagors would sell the stock then on hand, and put in more from time to time as they might be able or wish to do, and as they in fact did. And which view is strengthened and made almost conclusive by the clause in the mortgage relating to after acquired goods. That being the case, I think the mortgage of the whole stock that might be sold by the mortgagors is vitiated as to creditors.

"The supreme court of Illinois, in *Barnet* v. *Fergus et al*, reported in 51 Illinois, 352, have decided a mortgage under such circumstances to be void; in which decision I fully concur. If there had been a clause in the mortgage giving the mortgagors the right

to sell the stock and use the money as they might choose, it would have rendered the mortgage void in law as to the whole stock. *Place* v. *Langworthy*, 13 Wisconsin, 629; *Gardner* v. *McEwen*, 19 New York, 123; *Collins* v. *Myers*, 16 Ohio, 547; *Jordan* v. *Turner*, 3 Blackf. 309; *Edgell* v. *Hart*, 5 Selden (9 N. Y.) 213.

"To sustain a mortgage accompanied by such an agreement, consent or understanding, would allow a mortgagor to sell the mortgaged property as he saw fit, use the proceeds for his own benefit, exercise all the control, and enjoy all the advantages of an absolute owner, in defiance of his creditors. A mortgage accompanied by such an agreement or consent is no protection to the mortgagee. Such an agreement defeats its essential nature and quality as a mortgage, so that it cannot in a legal sense be called a security. It is nothing more than the expression of a confidence by the mortgagee in the mortgagor.

"To permit a debtor to guard his property against his other creditors by such a mortgage, would enable him to hinder and delay them as long as he and his confidential mortgagee might see fit. I am fully satisfied that a mortgage upon a stock of goods which authorizes the mortgagor to sell them and replace with others at such times and in such manner as he may determine, and use the proceeds generally as he sees fit, is void as to such goods as the power of sale relates to.

"Then the question arises, how may it be proven.

"If it is inserted in the mortgage, it is proven by the production of the mortgage; but if it is not, it may be proven by evidence *aliunde*. It is not necessary that it should be in writing or in the mortgage. It may be proven by parol, or inferred from circumstances and the conduct of the parties. It must of course be established by legal and competent evidence, and when thus established it is fatal to the security. If it appeared upon the face of the mortgage, it would be

held void by the court; 13 Wisconsin, 629, *supra*. But if not there, and it appeared by evidence *aliunde*, it would be the duty of the court to instruct the jury that such consent or understanding would avoid the mortgage."

This reasoning is of the most decisive character, and is supported to the fullest extent by the authorities referred to by the learned judge.

So, in *McLean* v. *Lafayette Bank* (3 McLean, at p. 623–4), it is held that a chattel mortgage unaccompanied by possession will be void, if the mortgagor sell the property.

So, a chattel mortgage on a merchant's stock in trade was held void, where the mortgagor with the consent of the mortgagee continued in possession, and made sales and replenished the stock in the ordinary course of business. (1869, *Matter of Manly*, 2 Bond 261: 3 Bank. Reg. 75: 2 L. T. (Bank.) 89).

It is hardly necessary to spend much time upon the English authorities. The law is too well settled there. The best proof that a power of disposition by the mortgagor would be held in England to utterly vitiate any security is this, that in the whole body of English law, not a single instrument containing such a provision has ever come before the courts there. On the other hand, in every case where any, the slightest, exercise of such a power by the mortgagor has been made to appear, that circumstance has instantly been laid hold of by the courts and held to attach a fatal taint to a transaction otherwise apparently *bona fide*. On this point we may be permitted to avail ourselves of the testimony of two of the learned judges in a couple of cases which have been cited against us. "*Fas est et ab hoste doceri.*"

In *Torbert* v. *Hayden* (11 Iowa, at p. 438–9), Lowe, C. J. declares that the following (among other similar) instructions, based on the cases of *Collins* v. *Myers* (16

Ohio, 247),and *Freeman* v. *Rawson* (5 Ohio St. 1), "harmonize with the English common law doctrine, and have for their authority quite a number of American decisions:"

"1. A mortgage of personal property which gives the mortgagor the possession of, and the right to sell, the mortgaged property, and deal with it as his own, is fraudulent and void as against the other creditors of the mortgagor.

"2. If the power of disposition appear upon the face of the mortgage, is fairly to be inferred from its provisions, or it is agreed by the parties at the time the mortgage was executed,—in either of these cases, when the fact is made to appear, the mortgage is fraudulent in law, irrespective of the intention of the parties."

In *Hughes* v. *Cory* (20 Iowa, at p. 401), Dillon, J. says, "That such an instrument would, by the English courts, be deemed fraudulent at common law and under 13 Eliz., both because the mortgagor was allowed to retain possession and to make sales from the goods, must be admitted."

The foregoing propositions are sustained and illustrated with very great ability in a host of authorities in the courts of the different States of this Union. The limits of a brief forbid our attempting to make the citations from them which we could wish, but we append a list of the principal decisions at the end of this argument. But while we are enabled to mass authority upon authority in support of our position, we should hardly feel satisfied, in dealing with a case arising upon the ancient common law, if we did not make some attempt, however feeble, to point out at least one principle upon which all these authorities must rest.

In the American editors' note to *Twyne's Case* (1 Sm. L. C. 53) they say, "The federal courts, and those which follow them, seem to hold, what there are many and strong reasons for believing to be the true interpre-

tation of the statutes of Elizabeth, that fraud under those statutes consists in the debtor's reserving to himself some interest or benefit out of the property conveyed;" and this is precisely the definition which has been given on the other side of the Atlantic. The idea that a secret benefit was intended for the grantor in contradiction of the apparent grant, is the leading principle on which these conveyances are void. Where the vendor or mortgagor remains in possession in such way as to be able to use the goods as his own, the transaction is always void as against creditors, even though made on valuable consideration; for in that case the remaining in possession is either inconsistent with the deed, and therefore fraudulent, or, if in accordance with the terms of the deed, it is none the more valid, for it proves, or is taken to prove, the unreality of the transfer, and that it was really intended to be for the grantor's benefit at the expense of his creditors. Nothing is better settled, than that the fact of possession being in accordance with a deed will not set it up, if there are circumstances from which a fraudulent intention may be collected. (*Riches* v. *Evans*, 9 C. & P. 640).

We do not know of any question arising upon the statute of Elizabeth which may not be soundly resolved by closely attending to the principles laid down in *Twyne's Case*. The following portion of Mr. Smith's note (1 Sm. L. C. p. 44) covers the points in this case so completely that we cannot forbear extracting it.

"In the principal case, Pierce, the grantor, was indebted to the grantee, Twyne, which debt would have been a sufficient consideration to support a *bona fide* transfer of the goods, and the ground on which the court proceeded was not that there was no sufficient consideration to sustain a grant by Pierce to Twyne, but that the secrecy, the non-delivery, the *clausulæ inconsuetæ*, &c., raised a presumption that the whole trans-

action was collusive and a juggle, and though purporting to be a sale, was, in reality, the creation of a trust for the benefit of Pierce; to use their own words, 'It was resolved that, notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Eliz. by which it was provided that the said act shall not extend to any estate or interest in lands, &c., goods or chattels, made on good consideration and *bona fide;* for although it is on a true and good consideration, yet it is not *bona fide*, for no gift shall be deemed to be *bona fide*, within the said proviso, which is accompanied with any trust.' In other words, although a debtor has a right to prefer one creditor to another, and by making a transfer of his property to one favored claimant to defeat the other, provided he do so in an open manner, and without any further object than his act upon the face of it imports; *still the law will not allow a creditor to make use of his demand to shield his debtor; and while he leaves him in statu quo by forbearing to enforce the assignment, to defeat the other creditors by insisting upon it.* Thus (to illustrate this position by Lord Coke's words in the principal case), 'if a man be indebted to five several persons in the several sums of 20*l.*, and makes a gift of all his goods to one of them in satisfaction of his debt, *but there is a trust between them* that the donee shall deal favorably with him in regard of his poor estate, either to permit the donor or some other person for him, or for his benefit, to use or have possession of them, *and is contented that he shall pay him his debt when he is able;* this shall not be called *bona fide* within the said proviso, for the proviso saith on a good consideration *and bona fide*, so a good consideration doth not suffice if it be not also *bona fide.*' "

Let us make a very brief application of these principles to the present case. Now, a pre-existing debt, although a sufficient, is not so good a consideration as

money actually paid at the time, even under the statute of Elizabeth, because it partakes more of the character of a preferential payment than of a fair security, while under the bankruptcy acts it is naturally regarded with still greater suspicion. It is therefore laid down that, in all cases where the consideration is of this nature, the whole transaction must be *free from doubt*. Although the law favors diligence, and, if the activity of one creditor has enabled him to obtain from a common debtor property or security on account of his claim in advance of the other creditors, will not deprive him of the fruits of his diligence, it still views the transaction with a jealous eye, and requires it to bear the strictest scrutiny in all its parts, so as to show that it was effected for the single-minded purpose of satisfying or securing the creditor's claim. It does not matter that the motive which prompted the transaction was the desire on the part of the creditor to get a preference, or even on the part of the debtor to give him one: that idea is necessarily present to a greater or less extent in every transaction of this kind. But, as between the debtor and the preferred creditor, the sole purpose and object, and the sole effect and operation, of the transfer made or security given, must be the benefit of the creditor by satisfying or securing his demand. No other idea is allowed to enter into the transaction. If the transaction is in any way designed to promote the convenience of the debtor, or the security contains a single provision tending to that object, then it is not *bona fide*. The only principle on which a creditor is ever allowed to interfere with that equal distribution of a debtor's property among all his creditors which the law so much favors, is found in the maxim, "*vigilantibus, non dormientibus, jura subveniunt.*" The distinction is between a transfer made solely by way of preference of one creditor over others, and a similar transfer made with a design to secure some benefit or advantage therefrom

to the debtor, or to delay creditors in the collection of their debts. While the law permits an insolvent debtor to make choice of the persons he will pay, it denies him the right to use the debt of the preferred creditor as a colorable consideration to screen and protect his property from the claims of other creditors, or to delay, hinder or embarrass them in the enforcement of their demands. Therefore, where the preference is merely a temporary arrangement to prevent a sacrifice of the property and preserve the rights of all to an equal distribution, with an understanding that the property shall constitute a part of an assignment to be subsequently executed, it is nevertheless fraudulent. Such an arrangement is against the policy of the law and the plain legal rights of other creditors. (*Johnson* v. *Whitwell* 7 Pick. 71); (*Low* v. *Graydon* 50 Barb. 414); (*Dalton* v. *Currier* 40 N. H. 237).

The mere retention of possession of personal property is altogether different from the retention of possession accompanied with a power to dispose of it for the grantor's benefit. Such a power in a mortgage is inconsistent with the nature and character of the instrument, and is tantamount to a power of revocation. An express or *de facto* power of revocation inserted in a deed has always been looked upon as a strong circumstance of fraud, and one which would make it void under the statute, for the simple reason that it enables the grantor to deal with the property after having affected to convey it away. (*Jenkyn* v. *Vaughan* 3 Drew. 419, 427; *Smith* v. *Hurst* 10 Hare, 30).

It will therefore be seen, that the great question in all cases (assuming that there is a real debt), is upon the *bona fides* of the transaction. It further appears that the well-settled idea of *bona fides*, within the meaning of the statute, is totally incompatible with the reservation to the debtor of any control, or power of disposition, or right of dealing with the property whatso-

ever. If such reservation appears upon the face of the security, it is void in law. In the present case, by the very terms of the deed, the uncontrolled right of disposition and sale is "expressly" reserved to the mortgagors. Their dominion over their property enabled them to give the security: in virtue of the same dominion they continue to sell it after the security is executed. It is, therefore, a conclusive, irresistible inference, as a matter of construction upon the effect of this deed, that it was a contrivance resorted to for the benefit of the mortgagors; not directed to the *bona fide* securing of the debt, but a mere cloak (as in *Twyne's Case*) by which the debtors intended to secure a benefit to themselves—a mere pretext to screen the property, and ward off other creditors, and consequently that it was void and of none effect. The case is brought within the very words of the 5th point resolved in *Twyne's Case*: "Here was a *trust* between the parties, for the donor possessed all, *and used them as his proper goods*, and fraud is always apparelled and clad with a *trust*, and *trust* is the cover of *fraud*."

But this is not the only feature of the deed which in its very terms conclusively displaces the idea of *bona fides*. In the recitals (ante. p. 9) we find an open declaration of such a degree of indifference as to the time at which, if ever, the debts should be wiped out, that it is impossible to believe that the instrument was taken for any real purpose of security to the mortgagees. No *bona fide* security ever contained a clause like this: "And whereas it is contemplated that if it is not convenient to pay the same, *it may be renewed from time to time as the parties may agree*." Whatever is out of the usual course, in the mode or time of payment of the debt which a deed professes to secure, is a mark of fraud. Here, then, we have at once, not only the *clausulæ inconsuetæ* of *Twyne's Case*, but the identical case of the creditor described by Lord Coke, who "is

contented that he shall pay him his debt when he is able." Such a loose and indefinite specification of the time the mortgage was to remain in force is utterly repugnant to the idea that there was any earnest or honest intention to obtain, by means of the instrument, first, security, and secondly, payment. No one can read the deed without the conviction that there was a secret trust or understanding for the benefit of the debtors. Moreover, such an arrangement operated, in the most effectual manner possible, to hinder and delay the other creditors, and was, in the highest degree, inequitable, and wholly inconsistent with fair dealing or a due regard to the rights of third parties. Where the legal effect of an instrument is to hinder or delay creditors, the law conclusively imputes to it a fraudulent intention.

But by no means upon the deed alone do we base our contention that this security is incontestably fraudulent. Let us look at the facts. We find Mrs. Sloan for ten years lending her money without a scrap of security: we find Robinson for six years lending his credit to any extent asked, without a scrap of security: no sooner is a security proposed, than a cut-and-dried mortgage is executed, containing the most unusual provisions: the demand (?) for the mortgage in no way disturbs the existing harmony between the parties: Robinson indorses as before, Mrs. Sloan's note matures and falls into default as before, but still the traders buy and sell at their pleasure as before: *twenty-one months* does Mrs. Sloan's note lie overdue: in the period of twenty-five months they pay (at their "convenience") one-third of Robinson's debt, and $82.30 out of $3,174 to Mrs. Sloan (at which rate it would have taken *forty* such periods, or over *eighty years*, to pay the lady off): and this easy state of things might have continued for an unlimited time, had not one of the traders been overtaken by death, and the consequent examination

into the affairs of the firm disclosed to the world that they were hopelessly insolvent: then, and not until then, when further collusion could serve the debtor's purpose no longer, do we find one or the other of these mortgagees taking the faintest step towards asserting their scanty rights. Is this a harsh picture of a pair of inexorable creditors pursuing their debtors for money or security to satisfy their just demands? Is it not rather one continued story of *trust* and *confidence*, which, as Lord Coke tells us, are ever found to constitute the apparel and cover of *fraud?*

The cases cited for the appellants may be disposed of in a very few words. Their whole argument proceeds on two hypotheses, as to which our only wonder is, how they could ever have got into the head of a lawyer. First, the notion that a local statute, declaring a well-known rule of common law practice, must in some way or other control the action of a federal judge sitting in equity. Second, and equally absurd, that a statute simply requiring chattel mortgages to be filed, has, at a stroke of the pen, repealed the common law, and all the statutes made against fraud from the commencement of legal history. Failing these points, their whole case fails. Compelled, as they are, to admit that the transaction they defend might well be found in the highest degree fraudulent, that even the most favorable of the authorities they are able to produce stamp circumstances such as are here found as "badges of fraud," what hope can they have in a court of equity? If a plaintiff, on his own showing, cannot put his case higher than the admission that it is, to say the least, questionable or doubtful, what title has he shown to the assistance of the court? He is bound to show a complete title, valid in point of law. So, as we shown, a security taken for an antecedent debt must be free from doubt. How then do the plaintiffs in this case expect any tribunal to draw

from their own statement an inference the reverse of that which they must admit it bears?

It has been repeatedly said, and more frequently perhaps with regard to cases of fraud than all others, that every case must stand on its own facts. The appellants cases may be divided into five classes: (1) where the whole question has been (as in the case of the long pending difference between the New York judiciary and the more popular branch of the court of Errors) between the respective functions of the judge and jury on a trial at common law: (2) where the consideration has consisted, not of an antecedent debt, but of a present advance, and the provisions of the mortgage have been of a more or less stringent character, as in *Briggs* v. *Parkman* (2 Met. 258); (3) where the mortgagor has only been permitted to sell as agent for the mortgagee, for the special purpose of applying the proceeds to the payment of the debt; (4) where, as in Iowa, some judges appear to have conceived (we submit quite erroneously) that the effect of their own chattel mortgage act was to do away with the common law and statute law on the subject of fraud; (5) and lastly, cases to which the only answer required is, that they occupy a conspicuous place in that useful work, Bigelow's Overruled Cases. To this latter class belong the case of *Mitchell* v. *Winslow* (2 Story 630) and the case on which that decision was founded (*Abbott* v. *Goodwin*, 20 Maine 408).

But appellants say the decree must be reversed, because "it was competent for the debtor to deliver his goods in pledge, and if there is no violation of the bankrupt act the pledge will be held good." Nobody will deny this proposition, or expect us to assent to the assertion which follows, that "no such violation is shown in the bill, and therefore the delivery of the goods to the complainants is good as a pledge." This proposition contains its own answer. If the act by which the goods got into the appellants' hands on 16th Sept. 1878

was a spontaneous delivery in pledge by the debtors, then a clear violation of the preference clause of the bankrupt law is apparent on the face of the bill, as it shows that the petition in bankruptcy was filed a few days afterwards. But the case made by the bill is not upon such a delivery at all, but upon their mortgage and a seizure under it. If the mortgage was void as fraudulent, of course possession taken under it could not help the parties. It is hardly necessary to cite authority to so plain a proposition. But the cases of *Re Eldridge* (2 Biss. 362), *Harvey* v. *Crane* (2 Biss. 500), *Janvrin* v. *Fogg* (49 N. H. 340), and *Edwards* v. *Harben* (2 Term Rep. 587), are decisive authorities, if any be needed. A third answer to any claim of the appellants that they improved their position by taking possession, lies in the fact that the seizure was not in accordance with the powers. A power must be strictly pursued. A *joint* seizure, therefore, by *both* creditors, of the *whole* of the goods, was no valid execution of separate powers to each creditor individually to seize and sell "sufficient" goods to satisfy his or her particular claim.

It is somewhat jesuitically hinted, though not openly argued, in the appellants case, that, though the mortgage might be void as against creditors, the assignee in bankruptcy stands in the same position as the parties who executed it. But, in cases of *fraud*, "the assignees of a bankrupt or insolvent debtor are entitled to the same rights and stand in the same predicament as the creditors themselves, and are deemed to represent them." (St. Eq. Jur. s. 371; *Anderson* v. *Maltby* 2 Ves. 255). Of course no point arises in this case as to subsequent creditors, as at least one creditor whose debt existed at the date of the transaction remains unpaid. And see *Whitmore* v. *Woodward* (28 Maine 417); *Pennington* v. *Clifton* (11 Ind. 165; *Dart* v. *Stewart* (17 Ind. 221); 1 American Leading Cases, (5th ed. 43); *Brown* v. *McDonald* (1 Hill. Ch. 297).

We submit, then, that we have shown, that the instrument before us was never an operative mortgage security, even between the original parties; that, as to creditors, it was fraudulent in the power of sale reserved to the debtors, in the arrangement for the indefinite prolongation of their liability, in its unusual provisions (not to be found in any ordinary precedent), so anomalous in their character and embarrassing in their operation; and further, that after default made, the continuance of the debtors to exercise as before the rights which the deed reserved to them became inconsistent with the mortgage itself, while that instrument was, in the first instance, in the highest degree inconsistent with the rights of other creditors.

Finally, we submit that no reported case, in any court or country where the English language is spoken, approaches this case in its features. If any case does exist, where parties have been found to deal from six to ten years without security as these parties have done here, then to take a security containing such provisions as that which they have taken here, and then for two years more to act in regard to that security as they show themselves to have acted here, we can only say, that that case we have been unable to find. And (adopting to some extent a thought from an eloquent writer), if ever there shall come a time when the soundest principles of equity and of law shall have been so eaten into as to admit of a transaction like this receiving the countenance and support of a court of justice, may we not, for the honor of our laws, as well as our judges, say, that such a period bears no resemblance to the present age!

And we conclude this portion of our argument in the words of Chief Justice Savage, in *Divver* v. *McLaughlin* (2 Wendell 602): "To SANCTION A TRANSACTION LIKE THIS, WOULD OPEN A DOOR TO FRAUDS INNUMERABLE, AND TO AN EXTENT INCALCULABLE."

Independently of the foregoing reasons for holding the appellants' mortgage fraudulent and wholly void, we conceive that the reasons and authorities which here follow will abundantly show that it certainly cannot create any lien on the after-acquired property. Although the rule on this subject is not entirely uniform, we think an examination of the decided cases will show that the conflict between them is more apparent than real.

The general doctrine is that the mortgage is void as to after-acquired property except where the mortgagor has a present actual interest in it or concerning it. There must be something *in præsenti* of which the thing *in futuro* is to be the product, or with which it is to be connected as necesaary for its use, or as incident to it, constituting a tangible, existing basis for the contract. The future property must be an accretion to the property already owned by the mortgagor, either by adding the future to the present, or by growth. This idea of accretion runs through all the cases. It is contemplated, all the time, that the present property is to be retained, and that the future property is not to be substituted, but merely added. Thus, one may sell all the wool which shall grow for a term of years on sheep *owned by him* at the time, but not the wool to be grown on so many sheep, *if he does not own them* (*Grantham* v. *Hawley*, Hobart 132).

So, a Railroad with its rolling stock and material, although acquired afterwards, must be regarded as an entirety, and the whole can be made the subject of mortgage. In such case, the after-acquired property is the product of capital, skill and machinery. The idea of accretion enters into it. But where goods are sold, and the proceeds invested in other goods, which are in their turn to be sold in like manner, and so on for months and years, there may be profit, but there is neither accretion or growth. It is *substitution*, the iden-

tical word employed in the mortgage which is the subject of this controversy.

No Indiana authority is in conflict with this rule. We ask attention to the few cases cited by appellants.

It is insisted by appellants that *Chissom* v. *Hawkins* (11 Ind. 316) is an authority for them, and decides that a mortgage upon after-acquired property is good. Appellants labor under a mistake as to the facts of that case. It does not involve the validity of a mortgage; that question is nowhere discussed in the opinion of the court. In that case the facts were these: By a written agreement between a landlord and his tenant, it was provided that the landlord should hold the crop as security for the payment of his rent. This agreement was entered into before the crop was matured or had any existence. When the corn was grown and gathered into a crib on the premises, it was purchased by Fowler and Earl, who had no notice of the agreement between the landlord and tenant. In an action of replevin brought by the landlord against the purchaser, the court held that the tenant might sell the crop without the consent of the landlord and vest a good title in the purchaser. In arriving at this conclusion, the court say that "the contract was entirely executory in its character, the crop having no existence at the time of the contract, and the title thereto not passing to the landlord." *Ubi eadem ratio, ibi idem jus.* Three years later, the case was again before the court under the name of *Fowler and Another* v. *Hawkins* (17 Ind, 211), and the doctrine was re-affirmed, that the provision of the lease attempting to secure a lien upon the whole crop would be inoperative as to good faith purchasers without notice.

By the authority of that case, may we not affirm here that inasmuch as the after-acquired goods had no existence at the time of the mortgage, no title passed to the appellants? It is true that the text of Smith's

Mercantile Law and the doctrine of *Mitchell* v. *Winslow* are cited with apparent approval by the court, but the reference is made in the shape of a suggestion in a supposed case. It is the merest *dictum*, and cannot break the force of the decision itself on the facts actually in the record. But let the lease be regarded as a mortgage, and then give to the case the fullest force asked for it by counsel, and it remains in harmony with the established rule, for the crop of corn was the direct result and growth of the land of which the mortgagor had possession. So far, then, from deriving any comfort from *Chissom* v. *Hawkins*, appellants will, on a careful examination, find that case in direct conflict with their theory of the law.

In *Coe* v. *McBrown* (22 Ind. 252), the facts were these. Coe held a trust deed or mortgage on the railway from Jeffersonville to Indianapolis, owned by the Jeffersonville Railroad Company, with the superstructure, rails and other materials used thereon. McBrown obtained a judgment against the Company, execution issued, and was levied by the Sheriff on 150 cords of wood purchased by the Company after the date of the mortgage. In this action, Coe asked an order enjoining the sale. The injunction was denied, and the complaint held bad for the reason that under the statute the mortgagor's interest or equity of redemption in a chattel may be sold on execution. The sufficiency of the complaint was the only question presented to the mind of the court. The discussion as to what property was intended to be covered by the grant, and the conclusion arrived at by the court, that the "wood" was embraced in the description of the trust deed, was not necessary or pertinent to a decision of the case. The vital question involved in this controversy was not raised or determined by the court. But granting, if you please, that the main question of after-acquired chattels was involved and decided, the case is consist-

ent with law, for the "wood" was, in legal contemplation, connected with the railroad, was necessary to its use, and was incident to it.

In many other states of the Union this question has been directly presented to the courts, and the law may be regarded as well settled in our favor. We respectfully ask attention to a few of these decisions.

In the District Court of the United States for Wisconsin, (*In re Kahley*, 2 Bissell 383), Judge Hopkins, in discussing a mortgage similar to this, uses this language: "It (the mortgage) is certainly invalid as to the after-acquired property," citing cases in New York and Wisconsin.

In Massachusetts, we find that *Jones* v. *Richardson* (10 Met. 481), furnishes a clear exposition of the law on this subject.

Wild, J. speaks as follows: "That a person cannot grant or mortgage property of which he is not possessed and to which he has no title, is a maxim of the law too plain to need illustration, and which is fully supported by all the authorities." *The court then proceeds to overrule Mitchell* v. *Winslow*, (2 Story 630), *Macomber* v. *Parker*, (14 Pick. 497), and *Abbott* v. *Goodwin* (7 Shepley 408), the identical cases relied on by the appellants in this appeal.

Jones v. *Richardson* decides another question material to this case. "The record of the mortgage deed is no sufficient notice of a legal incumbrance as to the subsequently acquired property, because by law no such property could be sold or conveyed thereby, and it would furnish no notice that any property would be afterwards purchased, or if purchased that any act would be done to ratify the grant in that respect."

In *Rice* v. *Stone and Another* (1 Allen 569), the supreme court of Massachusetts adheres to the same rule, in this language: "The other reason is a principle of law applicable to all assignments, that they are void

unless the assignor has either actually or potentially the thing he attempts to assign. A man cannot grant or charge that which he has not. *Jones* v. *Richardson* (10 Met. 481), *Moody* v. *Wright* (13 Met. 17), *Codman* v. *Freeman* (3 Cush. 309). In these cases the doctrine is applied to the mortgage of goods which may be subsequently purchased by the mortgagor."

The court will observe that counsel for defendant in that case cited and relied on *Mitchell* v. *Winslow* (2 Story 630), with as great confidence as appellants do to-day.

It seems to be admitted by counsel that the rule in New York is against the validity of the mortgage as to the after-acquired chattels. Not only this, but it is regarded as such a badge of fraud that a clause of that kind inserted in a mortgage may render it wholly void. *Otis* v. *Sill* (8 Barb. 102), *Engell* v. *Hart* (5 Seld. 213), *Gardner* v. *McEwen* (5 Smith 123), *Millman* v. *Neher* (20 Barb. 38).

The later cases in Maine support the same doctrine. *Abbott* v. *Goodwin* (20 Maine 408), cited by appellants, has been *expressly overruled* in that State by the more recent cases. *Sheldon* v. *Connor* (48 Maine 589), in referring to *Abbot* v. *Goodwin*, use this language: "The soundness of this decision has been questioned and the case may be deemed to have been overruled by *Head* v. *Goodwin* (37 Maine 181), and *Chapin* v. *Cram* (40 Maine, 561). The general rule, undoubtedly is that a person cannot grant or mortgage property of which he is not possessed and to which he has no title. *Com. Dig.* "Grant" (D); *Jones* v. *Richardson* (10 Met. 481)."

Morrill v. *Noyes* (56 Maine 586), is a case of marked ability. We respectfully ask the attention of the court to this authority as furnishing an able discussion of this important question.

The Court of Appeals of Kentucky do not appear to have expressly decided the question, but in *Wilson*

v. *Seibert* (8 Am. Law Register, N. S. 608), the subject is examined and settled by the Louisville Chancery Court. After a thorough consideration of a large number of authorities in the United States and England, Woolley, Chancellor, in an opinion of unusual clearness and vigor, holds the mortgage void as to after-acquired property, except when it has the nature of an accretion or growth.

In Wisconsin, there has been an unbroken line of decisions establishing the rule that a mortgage of after-acquired chattels is void. *Cheynoweth* v. *Tenney* (10 Wis. 397), a masterly case, declares that a chattel mortgage is inoperative to pass any title, either legal or equitable, to any specific property to be acquired by the grantor after the execution and delivery of the instrument.

A similar doctrine prevails in Ohio. "A chattel mortgage purporting to create a lien on the stock in a grocery, and also on such as should be subsequently acquired by the mortgagor, creates no lien on the subsequently acquired property." (*Chapman* v. *Weimar*, 4 O. S. 481). *Coe* v. *The Columbus, Piqua and Indiana Railroad Company* (10 O. S. 372) approves and follows *Chapman* v. *Weimar*, and says that "as to the transfer of title, a mortgage of goods and chattels to be subsequently acquired would stand upon the same ground in law and in equity. It could give 'no legal title or any equitable title to any specific goods,'" citing *Congreve* v. *Evetts* (10 Exch. 298).

We submit that although the question may appear, to some extent, an open one in Indiana, the judicial mind of the nation has ascertained and fixed the rule that after-acquired chattels are not subject to lien by way of mortgage.

For all these reasons, an affirmance of the decree is respectfully asked.

WM. E. NIBLACK,
J. M. SHACKELFORD,
AZRO DYER,
GEORGE PALMER,
R. D. RICHARDSON,
Counsel for Respondent.

Appendix of State Authorities.

NEW YORK.

Divver v. McLaughlin, 2 Wend. 596.
Wood v. Lowry, 17 Wend. 492.
Griswold v. Sheldon, 4 N. Y. 581.
Edgell v. Hart, 13 Barb. 380.
Same Case on appeal, 9 N. Y. 213.
Delaware v. Ensign, 21 Barb. 85.
Gardner v. McEwen, 19 N. Y. 123.
Ford v. Williams, 24 N. Y. 359.
Conkling v. Shelley, 28 N. Y. 360.
Miller v. Lockwood, 32 N. Y. 293.
Russell v. Winne, 37 N. Y. 591.
Mittnacht v. Kelley, 3 Abb. App. Dec. 801; 3 Keyes 407.
Yates v. Olmstead, 65 Barb. 43.

(These two last cases are the latest New York decisions we have seen, and are expressly in point.)

MASSACHUSETTS.

Harris v. Sumner, 2 Pick. at p. 133.
Platt v. Brown, 16 Pick. 553.
Robbins v. Parker, 3 Met. 117.
Crowninshield v. Kittredge, 7 Met. 520.
Kimball v. Thompson, 4 Cush. at p. 446.

NEW HAMPSHIRE.

Putnam v. Osgood, 51 N. H. 192; 52 N. H. 148.

OHIO.

Collins v. Myers, 16 Ohio 547.

Freeman v. Rawson, 5 Ohio St. 1.

Harman v. Abbey, 7 Ohio St. 218.

(These Ohio cases have been recognized as sound in Indiana, (Wilcoxson v. New Albany Insurance Company, 21 Ind. 355); in Tennessee, (Tennessee Bank v. Ebbert, 6 Am. L. T. 72); and in the federal courts, (Re Manley, 2 Bond 261, and Re Kahley 2 Bissell, 383).

WISCONSIN.

Place v. Langworthy, 13 Wis. 629.

ILLINOIS.

Davis v. Ransom, 18 Ill. 396.

Read v. Wilson, 22 Ill. 377.

Barnett v. Fergus, 51 Ill. 352.

GEORGIA.

Nichols v. Hampton, 46 Ga. 253.

TENNESSEE.

Tennessee National Bank v. Ebbert, 6 Am. L. T. Rep. 72, (1873, February No.)